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HEARING

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In the Matter of:

Adjustment of the Rates for
Noncommercial Educational
Broadcasting Compulsory
License

Docket No. 96-6
CARP NCBRA

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Friday,
March 13, 1998

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

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ORIGINAL

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I-N-D-E-X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Robert Unmacht				
By Mr. Shore	882		960	
By Mr. Kleinberg	926		968	
By Mr. Stein		928		
James Day				
By Mr. Schaeffer	970		1055	
By Mr. Rich		1016		
Horace Anderson				
By Mr. Schaeffer	1067		1114	
By Mr. Weiss		1073		
Laurent Iossa				
By Ms. Willett	1120			

E-X-H-I-B-I-T-S

<u>Exhibit No</u>	<u>Description</u>	<u>Mark</u>	<u>Recd</u>
<u>ASCAP</u>			
1		926	
5-9	<u>Current</u> Article		1119
35-61			1133

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P-R-O-C-E-E-D-I-N-G-S

(9:34 a.m.)

CHAIRPERSON GRIFFITH: We'll go on the record. Let the record reflect that the reporter's been previously sworn and remains under oath.

MR. RICH: Thank you, Your Honor. Good morning. With respect to 7X and 8X, the submissions, we, simply because of a vacation of the lawyer in our office who is most familiar with this issue, we have agreement from the other side if the panel agrees, that rather than provide that submission to the panel next Monday, the 16th, we would do so on Friday the 20th.

CHAIRPERSON GRIFFITH: It's no problem.

MR. RICH: It's no problem? Thank you very much.

CHAIRPERSON GRIFFITH: So 7X and 8X.

MR. RICH: Secondly, I thought it would be useful to give some sense, I think, of the parties, of how we're doing on progressing through witnesses and the issues of extra days and the need for them, and I think it's a good report; not a bad report.

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1 I think our hope and expectation at this
2 point is that probably by next Thursday, but certainly
3 by no later than next Friday, all of the BMI and ASCAP
4 cases should be completed.

5 Our desire is that if the totality of
6 those cases and say, by Thursday evening, and not
7 necessitating further BMI or ASCAP trial time Friday,
8 that the panel, if it's agreeable, agree that we put
9 on our case beginning the week of the 30th.

10 And I'll further represent that everybody,
11 at least presently believes that the four days
12 allotted that week, exclusive of the day that we can
13 no longer meet, should more than cover the entirety of
14 our case; meaning that we don't foresee difficulty
15 with us beginning on the 30th and ending on the 2nd,
16 with all cross examinations without need to reserve
17 additional days.

18 CHAIRPERSON GRIFFITH: Well, that's very
19 encouraging. One of the things that I was confused
20 about was Dr. Boyle.

21 MR. SCHAEFFER: Yes.

22 CHAIRPERSON GRIFFITH: He was originally

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1 schedule to testify on the 30th, is that right?

2 MR. SCHAEFFER: What originally happened
3 was, we had proffered the 30th. There was objection
4 on the part, I believe, of the Public Broadcaster --

5 CHAIRPERSON GRIFFITH: Yes, and BMI.

6 MR. SCHAEFFER: -- and so we rescheduled
7 him for Thursday. And he is scheduled now for
8 Thursday. I'm advised by the BMI folks that they may
9 be finished a little early and I've tried to get a
10 hold of Boyle which I've not succeeded in doing, to
11 see if he could come in on Wednesday, but I'm not
12 certain he could. We may have to break on Wednesday,
13 where you guys may want to do something.

14 On terms of how long we have to continue,
15 to some degree -- although I don't think -- it's
16 unlikely but it is possible that the length of the PBS
17 direct case will be dependent upon what happens with
18 the documents.

19 Because if I do have to present the
20 documents individually to the witness, obviously --
21 I'm not going to do all of them -- but it will
22 protract the direct case so maybe that's what we -- we

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1 haven't yet discussed because they were weary at the
2 end of the day, which is understandable. We haven't
3 discussed yet what documents we're going to stipulate
4 to.

5 I have to tell you, I'm greatly concerned
6 about what's going on now because I saw Mr. Shore at
7 quarter-of-eight this morning and he was going over to
8 White & Case to pick up Unmacht who I saw last night
9 but hasn't shown up. It scares me because Unmacht had
10 a car.

11 CHAIRPERSON GRIFFITH: You think possibly
12 they thought it was 10 o'clock instead of 9:30?

13 MR. SCHAEFFER: No, I don't think so. No,
14 no, I don't think so, Your Honor. I'm quite sure they
15 knew it was 9:30. There was never any doubt about
16 that.

17 Ms. McGivern's calling my office in the
18 District to see if -- they were going to meet there
19 originally. I have to apologize but I really don't
20 know what the delay is. Mr. Day was going to schedule
21 today. He's an elderly gentleman and I didn't want
22 him to sleep over if he didn't have to, so he's coming

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1 in and should be here, I guess by 11. But that's not
2 -- I mean, Unmacht is here, I saw him last night. But
3 again, I don't know what's wrong.

4 MR. SALZMAN: Your Honor, one other matter
5 -- a housekeeping matter, if you will, or a
6 preliminary matter. The panel had discussed
7 yesterday, as well as previously, that the parties
8 would appropriately stipulate to make sure of the
9 panel's power to order a fee starting effective
10 January 1st, 1998 --

11 CHAIRPERSON GRIFFITH: Yes, the
12 stipulation.

13 MR. SALZMAN: -- and I drafted such a
14 stipulation and the parties are agreeable to it. So
15 I thought it would be appropriate to tender it here to
16 Your Honors, as a matter to meet the panel's needs as
17 to form. And if it does then we would execute the
18 stipulation then.

19 CHAIRPERSON GRIFFITH: Fine.

20 MR. SALZMAN: Let me hand that to you.

21 CHAIRPERSON GRIFFITH: Mr. Salzman, is it?

22 MR. SALZMAN: Yes.

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1 CHAIRPERSON GRIFFITH: Explain to me, on
2 page 2: and such determination shall specify the
3 method by which any retroactive adjustment in payments
4 to January 1, 1998, shall be made.

5 MR. SALZMAN: It's a pretty simple
6 thought. I think in the past payments to BMI I think,
7 come in October of the year.

8 CHAIRPERSON GRIFFITH: Right.

9 MR. SALZMAN: If everything is all done by
10 October there would be no need to do that. But if for
11 any reason they weren't then there would be a
12 specification of what was supposed to happen.

13 JUDGE GULIN: Is there any way that you
14 can agree to that now, as to what that method would
15 be?

16 MR. SCHAEFFER: We found him. I
17 apologize.

18 CHAIRPERSON GRIFFITH: It's fine, as far
19 as I'm concerned personally. It's just, so that we're
20 clear on the last item, if you all have no questions
21 about it and you sign it then we will certainly enter
22 it.

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1 MR. SALZMAN: If it's agreeable I'll
2 retrieve a copy and have the parties sign it.

3 CHAIRPERSON GRIFFITH: Fine. You may have
4 to tell us how to adjust it, but --

5 MR. SALZMAN: It might be in the briefs.

6 CHAIRPERSON GRIFFITH: Okay. Mr. Shore?

7 MR. SHORE: Ready when you are. Again, I
8 apologize for showing up late.

9 CHAIRPERSON GRIFFITH: That's all right.

10 MR. SHORE: We call Mr. Unmacht now.

11 CHAIRPERSON GRIFFITH: All right. Mr.
12 Unmacht, come forward please, sir.

13 WHEREUPON,

14 ROBERT UNMACHT

15 was called as a witness by Counsel for ASCAP and,
16 having been first duly sworn, assumed the witness
17 stand, was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. SHORE:

20 Q Mr. Unmacht, would you please introduce
21 yourself to the Arbitrators?

22 A Robert Unmacht, M Street Corporation in

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1 Nashville, Tennessee.

2 Q Would you please describe what M Street is
3 and what it does?

4 A M Street keeps track of approximately
5 13,000 radio stations in North America. We keep a
6 database of all the radio stations -- any radio
7 stations that are licensed by the Federal
8 Communications Commission. We take that information
9 and we publish in the form of an annual directory.

10 We do customized directories for other
11 parties. We publish a weekly newsletter regarding
12 general industry news and changes at the FCC. We put
13 out a daily fax that we just began; that is industry
14 news on a daily basis.

15 We also provide information on a custom
16 basis to anybody who needs it through the form of
17 mailing labels, telemarketing reports, custom reports
18 and databases. If it has anything basically, to do
19 with radio, we try to be of assistance if we can.

20 Q What information is contained in the
21 publication?

22 A In the directory, it contains station's

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1 call letters, frequency, technical information, who
2 owns them, where they're located, who operates them if
3 it's different than who owns them, who manages them --
4 program director, general manager, sales manager --
5 what market they're in, basic 12plus -- people over
6 the age of 12 Arbitron information.

7 In our other products, the weekly prints
8 anything that was filed with the FCC regarding radio
9 on a weekly basis, as well as news that we gather and
10 publish.

11 Q Do you also publish information about the
12 program that is aired on these 13,000 stations?

13 A We have programming information -- I
14 should mention that -- in the directory, and any
15 custom products that are required. As well as in the
16 weekly publication we list all the format changes,
17 generally somewhere between 30 and 70 each week, that
18 we've been able to locate.

19 Q How does M Street gather its data,
20 particularly with respect to the programming on
21 stations?

22 A Programming is gathered quite a number of

1 ways, and that's sort of become our specialty over the
2 years because we found a good way to track it. It all
3 began when the founder of M Street, Jeov Parrish,
4 decided he liked to travel. He also loved radio.

5 So he started by going to all the markets
6 in the United States and listening to them, and we
7 tried to keep that alive. Whenever anybody in our
8 company is traveling we actually go to the markets,
9 listen to what's going on.

10 We also have a network of stringers, most
11 of which are unpaid or simply comp for subscriptions,
12 who love radio and feed back changes in their markets
13 along with newspaper articles, general diaries of what
14 they've heard.

15 We trade information with radio writers
16 and reporters. We call anyone who has sold, we call
17 anyone who has had a call letter change, and at least
18 once a year we call all the radio stations in the
19 United States and Canada.

20 We also, in addition to that, trade with
21 other people who produce our types of data -- people
22 who might maintain an internal database of radio

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1 stations for their purposes. We'll go in and compare
2 ours against theirs. Our clients feed back changes.

3 We have many of the radio networks for
4 instance, who market to radio stations. When they run
5 across a change to the data they'll feed it back to us
6 as well. So we're really looking any place and all
7 places that we can find even a hint of a change, and
8 we'll go after it.

9 Q Would you describe the type of consulting
10 work that M Street does in a little more depth?

11 A Consulting-wise it comes down to what
12 people need, and we do that both for a fee, as in the
13 case of -- well, say someone like ABC or NPR who came
14 to us recently -- and they'll have a specific request.
15 We need to know -- in the case of NPR -- we're trying
16 to find radio stations that are not presently a member
17 and are not programming a religious format, who might
18 be able to use our product.

19 We'll do a list like that, and they also
20 consult on a non-fee basis with other journalists and
21 publications. The Wall Street Journal uses us, The
22 New York Times, again NPR through Morning Edition, All

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1 Things Considered, Weekend Edition, a whole list of
2 local newspaper, TV networks.

3 When they need something about radio, or
4 need background on radio, then they'll come to us and
5 we'll assist them with that as well.

6 Q Besides the NPR project you described,
7 could you describe sir, other recent contacts with
8 public radio in the United States?

9 A We're contacting radio stations every day
10 of the week. The one that came to my desk just this
11 week as we're trying to finish this year's directory
12 was a brand new public station in Guam.

13 And we talked to them to find out who was
14 running them -- the usual things -- who's running you,
15 what programming are you interested in -- they were
16 very surprised to hear from us. How do you know we
17 just came on the air? But we're contacting them
18 throughout the year.

19 Q Other contacts with NPR programming?
20 Programs that -- you had mentioned Morning Edition?

21 A Morning Edition -- I think we were doing
22 deregulation -- I get kind of confused because I do

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1 five, six interviews a week -- we were talking about
2 an update on deregulation of radio.

3 Recently on Weekend Edition it was the
4 growth of the format called Americana, which is sort
5 of a progressive country-type format.

6 Q And you appeared personally on those
7 shows?

8 A In the case of Morning Edition it was done
9 by telephone; in the case of the Americana interview
10 it was done at the studios of WPLN in Nashville.

11 Q In your written testimony you speak of two
12 types of radio broadcast licenses: commercial
13 licenses and public licenses. Could you describe to
14 the arbitrators what those are and how the industry
15 breaks down?

16 A There are a little over 10,000 commercial
17 radio licenses in the United States and there are a
18 little over 2,000 public licenses in the United
19 States. The FCC has set aside a band of 88 to 92
20 megahertz for the not-for-profit stations -- although
21 many of them were in existence before that and reside
22 on the AM band or outside of that reserved area.

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1 And the difference between the licenses:
2 one can of course, take its profits and return them to
3 its owner; the other, the public stations cannot.
4 They have to, just like any not-for-profit business,
5 has to keep the money that they raise within their --
6 well, they can't distribute profits, essentially.

7 They operate under, for the most part,
8 similar rules. There are some restrictions on how you
9 raise money if you are a not-for-profit, and you get
10 a few breaks when it comes to filing paperwork with
11 the FCC, but nothing horribly substantial. From a
12 technical standpoint the two operate identically.

13 Again, there are a couple of breaks. If
14 you're between 88 and 92 megahertz you have a couple
15 of breaks in how you make technical showings, but it's
16 nothing substantial. It actually benefits you; you
17 don't have to keep quite as much distance separation
18 between two stations.

19 But really for the most part they operate
20 almost identically. The difference comes down to what
21 you can do with your profits. There's no difference
22 in what you can program between the two. You can be

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1 a rock-and-roll station and be commercial; you can be
2 a rock-and-roll station and be non-commercial; you can
3 play classical music and be commercial, and vice-
4 versa.

5 So the FCC maintains no restrictions on
6 programming or news content or anything like that
7 between the two licenses.

8 Q With respect to the public licensees, do
9 you have an understanding of how many are being
10 licensed in this proceeding?

11 A In this proceeding we were asked to look
12 at the CPB list of stations; we were asked to look at
13 the NPR list of stations. We also look at the PRI
14 list but we didn't use them to factor into the list.

15 When we put the two lists together and we
16 took out some of the stations that didn't actually
17 exist and added a few that we knew were part of the
18 system by nature of, they had to be to be using the
19 program, we came up with a little over 700 stations
20 that appeared to be qualified to be in this
21 proceeding.

22 Q Okay, when you speak of on the NPR list,

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1 you mean NPR members?

2 A NPR member stations.

3 Q Can you describe what a NPR member is?

4 A Actually, on the NPR list it contains both
5 member stations and those that were CPB qualified but
6 not NPR members. So both groups were on the NPR list.

7 To be an NPR member, to answer your
8 question, you have to meet their qualification
9 criteria to become a member, and they involve -- in
10 the case of AM they told me, because we just did this
11 project, they said you had to cover a certain number
12 of people and you have to be of a certain size to
13 qualify.

14 Q And on FM, do you know?

15 A Same on FM. Yes, I don't know if they
16 have a requirement as to the number of people within
17 your contour on the FM side or not. I didn't get into
18 that very deeply.

19 Q If you would turn to the Appendix of your
20 written testimony now. Just to the first page. Would
21 you describe to the arbitrators what that is?

22 A This is a printout from the database that

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1 we were asked to create, of those stations that were
2 on NPR's list and/or on CPB's list. And what you've
3 got here is the colors of the station as licensed by
4 the FCC. That's why if you don't see a "-FM" on the
5 list it does not mean it is an AM. The FCC actually
6 licensed that "-FM" extension as part of the call
7 letters.

8 Most of these are FMs. There's a few AMs
9 on the list. The city of license -- not the market
10 that they may serve, but the actual city of license
11 that is on their license. That's why in some cases
12 you may see a smaller town but it's serving a bigger
13 city nearby.

14 The state that the city of license is in;
15 the amount of money that CPB reported that the station
16 received; who the owner is of the radio station. If
17 you see plus in front of the owner's name that means
18 it's part of a group of stations or a network of
19 stations.

20 And then a format -- this is just a very
21 broad category. We don't try to list everything that
22 the station is doing. They may have a Greek hour on

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1 Sunday morning and that's not of value to most of our
2 customers. What most of our customers want to know
3 is, what is the station doing primarily?

4 If you see a slash between the two such as
5 classical and jazz, that means that the station is day
6 parted. And by day parting I mean that part of the
7 day they are playing classical music and part of the
8 day they are playing jazz.

9 And then the last column simply is
10 something that we use and I thought would be of
11 benefit here, is the origination source for the
12 majority of the programming. If it is "N" then most
13 of what they're taking is from a state network or area
14 network. If it's "S" it's simulcasting another
15 station within the same market area. And if it's "R"
16 it's rebroadcasting another station that either is not
17 owned by this entity or is outside of the market area.

18 Q And if you'd turn to the last page of the
19 appendix, just as a matter of explanation, the column
20 with the dollar amount for the CPB funds runs from
21 zero to two dollars. Could you explain what that is?

22 A Right. Where you see two dollars -- I

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1 just picked the figure of two dollars. They don't
2 actually get two dollars in the mail. That was so
3 that I could, when I'm sorting through the list, know
4 which stations were receiving money by being
5 associated with another station that does.

6 CPB didn't break down, for instance, in
7 most cases -- I'm looking at one here, Central
8 Michigan University. The primary station in that
9 group receives funding. These other stations are all
10 carrying exactly the same programming as the other
11 ones, so they're obviously making use of the funds.
12 So they were included by nature of using those funds,
13 so I put two dollars there to represent that the
14 station that they're connected to is receiving funds.

15 Where you see no dollars, those are
16 stations that were reported by NPR as being CPB-
17 qualified but not receiving any CPB dollars and yet
18 are members of NPR, because NPR is one of their
19 requirements of CPB to be qualified.

20 Q With respect to these 700 or so stations
21 in the appendix, have you had an opportunity to
22 familiarize yourself with their operations?

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1 A Many of the stations of course, I've had
2 the privilege to hear and listen to as I drove around
3 the country, but I also went through each station on
4 a case-by-case basis looking -- well, I had to just
5 make sure they belonged on the list, call letters
6 matched, that there hadn't been any changes since the
7 list was published as in a couple of instances
8 stations had been sold or went on to do other things.

9 So we had a chance to review each station
10 on the list one-by-one, look at who owned them, look
11 at the programming, see which lists they were on.
12 Yes.

13 Q Did you have an opportunity to look at any
14 materials from the Web?

15 A Looked at Web sites both on the Internet
16 and a couple of file size boxes of them that were
17 provided by White & Case, looking for instances in
18 there of programming, program guides, fundraising
19 efforts, differences to ratings, just general
20 information about the station. We looked at quite a
21 few.

22 Q Is this the same sort of material that you

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1 rely upon in M Street's normal operation?

2 A Everything that we did here is, with the
3 exception of comparing the NPR and CPB -- well, it's
4 not two different either. NPR lists we've looked at
5 often. This is the first time I've ever done a CPB
6 list.

7 But yes, reviewing network lists,
8 reviewing the stations, the types of information that
9 we're tracking on these are the same things that we do
10 for all the stations in North America and have --
11 well, I've been doing it since 1987 with this company
12 -- and we've never drawn a distinction -- in fact,
13 compared to some of our competitors -- we've never
14 drawn a distinction between public broadcasting and
15 commercial broadcasting.

16 Because if you were a manufacturer of a
17 radio station tower or if you're the associated press
18 and producing news, they're your marketplace every bit
19 as much as commercial stations, and we try to help
20 people reach radio.

21 If you're a PR firm you need to reach
22 these people. If you're an advertising agency then

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1 you are probably dealing with both groups. So we've
2 never kept them segregated or separate; we've always
3 kept them all together.

4 Q Would you provide the arbitrators -- or
5 could you provide the arbitrators with a general
6 description of these 700 stations?

7 A The 700 stations tend to be larger
8 stations. You don't find -- other than a few of these
9 that are rebroadcasting to fill in holes or pockets in
10 a state network -- they tend to be the larger of the
11 public radio stations, they tend to be for the most
12 part -- with a few exceptions -- they tend to follow
13 a similar pattern, formula if you will, to how they
14 organize their day.

15 It's very successful one and as the world
16 became more marketing savvy you saw commercial
17 stations sounding a little bit more and more alike.
18 You can be in Washington, D.C. and listen to MIX 107;
19 you can go to my home town of Nashville and listen to
20 MIX 92.9. They're not owned by the same people, they
21 may or may not even know of each other's existence,
22 but somewhere along the way they came up with almost

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1 identical-sounding radio stations.

2 The same has happened in public
3 broadcasting. These stations know what has worked,
4 they go conferences, they share ideas, and out of this
5 there's come the formula if you will, that has been
6 very, very successful for both the listeners and for
7 the stations.

8 These stations that receive the CPB
9 funding and members of NPR tend to follow that
10 pattern. The stations that don't tend not to be found
11 on the list, they tend not to be CPB-qualified or part
12 of NPR or the programming. Something radically
13 different, such as religion.

14 Q Would you describe that formula you're
15 speaking of?

16 A If you were to pick a typical -- if there
17 is such a thing as a typical station because each of
18 these are unique individuals just as humans are unique
19 individuals -- but you can probably say that certain
20 groups -- if we say lawyers -- have these traits in
21 common.

22 The same thing is true here, and it

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1 usually works on a pattern of Morning Edition in the
2 morning, taking the network feed and adding to it
3 local information in cutaways, using some form of
4 music -- usually classical or jazz are the most two
5 common forms found in the mid-day hours, returning
6 back to NPR for All Things Considered in the
7 afternoon.

8 Then usually something like PRI's
9 Marketplace show, maybe a local talk show or Fresh Air
10 from NPR. And then returning to music at night; many,
11 many of them using a service such as Classical 24
12 which is provided by PRI -- it's a classical music
13 service -- or Beethoven Network which is done by WFMT
14 in Chicago, to carry music through the night. Others
15 go back to their jazz, if you will.

16 And that's -- if you just sort of had to
17 say what would be the most common, larger station,
18 public station, that would be the model.

19 Q And what are the variations on that theme?

20 A Variations, you can then go to -- some
21 stations have found that the information that has been
22 so successful in Morning Edition, All Things

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1 Considered, worked in their marketplace throughout the
2 day. Stations like KQED in San Francisco have done
3 very well with that model.

4 Other stations have found that music
5 really is their bread-and-butter -- a station like
6 WBGO in Newark, New York -- and they'll do music
7 throughout the day.

8 Q In your testimony you also speak of Mom
9 and Pop stations. Would you describe those?

10 A Mom and Pop -- really they're the -- they
11 are stations that are mostly diverse programming,
12 often carrying 20 or more formats. We have one in
13 Nashville, WRVU, from the Vanderbilt University.

14 They tend not to follow the formula, they
15 tend to do all kinds of things. Most of those
16 stations aren't in this proceeding as I understand it,
17 because they aren't members of NPR or many not be CPB-
18 qualified. We found in doing this, 60-some stations
19 that probably would fit into that category that were
20 party to this, but there's a lot more going on.

21 Q With respect to the 640 other, what you
22 called formula stations, would you describe the

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1 quality of the product that they're broadcasting?

2 A The quality of the product is excellent --
3 both at the local level and the national level. I
4 think you'd be hard to find someone unless they had a
5 political viewpoint that might differ from a show they
6 heard, that would say that NPR produces garbage. They
7 don't; they produce quality.

8 And most of the stations have used that
9 quality image to their advantage as well and they
10 produce quality programming back at home. I can't
11 think of an instance, although there may be one out
12 there, where they've got Morning Edition and then
13 Performance Today, and then they have -- then they
14 bring in a student to play his home record collection.
15 I can't think of that combination in this group.

16 Q Would you describe where these individual
17 stations are getting their programming? Expand on the
18 sources of programming.

19 A Public radio has a huge variety of sources
20 to draw on. First of course, they can produce it in-
21 house; stations like WBGO. They simply can go to
22 their record library and create programming there. Or

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1 if they're associated with a learning institution --
2 though you see less of this than you used to -- they
3 also used to draw on that as educational programming,
4 if you will.

5 After that they can go to other public
6 radio stations, either distributed through older means
7 such as tape, but more common than that if they're in
8 this group they're a member of NPR's -- by being a
9 member of NPR they're also a member of NPR's satellite
10 interconnect system, which connects together all the
11 public stations. They can use that network to
12 distribute their own programming.

13 Quite often people will think -- I've even
14 talked to stations who say, oh we get that programming
15 from NPR. Well, it's not coming from NPR. It's
16 coming off of NPR's satellite system but NPR is not
17 producing it.

18 And then of course they got, in addition
19 to the long list of programs there, there are
20 independent producers who make the programming
21 available -- send them both to commercial stations and
22 non-commercial -- some just to non-commercial. And

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1 then we also have NPR and PRI's full line-up of
2 programming that's available to them.

3 BBC is also making a great deal of
4 programming available and I don't know if you have to
5 go through NPR to get that or PRI. I don't know how
6 directly that programming is made available, but the
7 BBC right now is also making quite a bit of
8 programming available to public stations.

9 Q Would you explain what PRI is?

10 A PRI is Public Radio International, and
11 Public Radio International was founded by many of the
12 same people who founded Minnesota Public Radio. I
13 have heard it told both ways: Minnesota Public Radio
14 created PRI and PRI had nothing to do with Minnesota
15 Public Radio. I don't know which is the truth. It
16 just depends on who you talk to which story you get.

17 But it is in Minnesota and it does have
18 many of the same people involved with it. It was
19 created as an alternative to NPR as a program's
20 provider to public radio. I've seen -- arguably we'll
21 say, their most successful show is the Prairie Home
22 Companion, which is most often cited when I talk to

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1 people at stations -- the reason that they want PRI
2 around is so that they can continue to get Prairie
3 Home Companion.

4 The show's so successful that even when
5 Garrison Keillor, who is the host, took -- well, he
6 said he was going to cancel the show but he's since
7 come back to it -- the show went right on running in
8 reruns; it never went away.

9 Q With respect to sources of programming,
10 I'm going to hand you a series of documents which were
11 collected in ASCAP Exhibits 506 and 507. It's easier
12 than going through three boxes. Could you identify
13 those documents for the arbitrator, please?

14 A These are advertisements that -- since
15 it's stamped at the bottom from the Current, which is
16 a newspaper that covers public radio. These are
17 advertisements from program providers for programming
18 that public stations can carry.

19 Q And these would describe the programming
20 that they could take off the feed? The individual
21 stations?

22 A Yes. The purpose here is to gain

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1 clearance for these programs on public stations.
2 Since the public stations control what they choose to
3 air and not air, there's no programming that you have
4 to take. These are ads to get you to clear programs:
5 some from PRI, some from NPR, some from -- as in the
6 case of the Mardi Gras special -- some coming from
7 other stations themselves.

8 Q Would you describe the programming that's
9 coming from the stations themselves? I believe you
10 referenced it in your testimony.

11 A Well, I can do it from these. WWOZ which
12 is in New Orleans, advertising the Mardi Gras special;
13 WGBH in Boston, Church of the Sonic Guitar; WFMT,
14 which is promoting its all night jazz service which is
15 its new companion service to its all night classical
16 service.

17 Interesting to note, WFMT is owned by a
18 non-commercial entity, but it itself is a commercial
19 radio station and is the only -- to my knowledge, the
20 only commercial radio station that is a member of
21 Public Radio International. They carry PRI
22 programming even though they're a commercial station.

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1 Q With respect to the large stations in this
2 group -- the 640 or so -- would you briefly describe
3 their efforts to market their product?

4 A Public radio has gotten very aggressive in
5 marketing itself, as have most of the businesses of
6 the world. The '80s and '90s were a period of the
7 world discovering just how effective marketing can be.

8 Have promoted themselves, as do commercial
9 stations, in two ways. On one side they are promoting
10 themselves to the listener and they're doing that
11 through cosponsoring concerts, advertisements,
12 billboards -- I've seen more than one wraparound bus,
13 if you've ever seen the full bus that has an ad all
14 the way around it; I've seen them do that.

15 They're marketing themselves through the
16 Internet, backs of milk cartons -- the same way that
17 most businesses promote. They're advertising their
18 product or they're becoming involved with their
19 listener's lifestyles.

20 But they also promote on the other side to
21 advertisers to support the station, and they do that
22 through selling the quality benefits of their station,

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1 their audience, their demographics -- break the
2 audience into their demographics and their income
3 potential and their pcyhographics and how they think
4 and all those things.

5 So just the same way that a commercial
6 station is both giving its product away on one side
7 and charging for its product on the other side,
8 they're doing the same. They're giving it away to the
9 listeners and they're charging to deliver those
10 listeners to advertisers and underwriters, because
11 some of those are not advertising but just wishing to
12 show their support to public radio.

13 Q Would you describe on-air pledging?

14 A On-air pledging is a chance to go on the
15 air and ask the listener to directly support the
16 station by sending in money. And for doing that
17 they're told that they will get quality programming in
18 return and they may also get a coffee mug or a
19 cassette tape or something like that as well.

20 The pledge drives have no set length.
21 I've heard them done over a weekend, I've heard them
22 done over a month. They can take over the programming

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1 entirely; it can be nothing but talk about how we need
2 money and asking for the donation, or it can be done
3 with simply a mention each hour that this is our
4 pledge drive week and would you please support it.

5 I've even heard it done where, if you give
6 money this week we won't do pledge drives next week.
7 So it can take any shape or form really. But it's a
8 chance to go and ask the listener to directly support
9 the programming that they're listening to.

10 Q I'm going to hand you another series of
11 documents taken from Exhibits 615 and 617 that are
12 sponsored in your testimony. Could you describe those
13 documents?

14 A These are taken from Web sites and they
15 are describing the revenue generating side of public
16 radio, both through pledge drives and through
17 advertising on the station. A number of them are
18 thanking areas businesses for their support as well --
19 chance to additionally promote the businesses that are
20 helping them.

21 Q Would you turn to the back of that stack,
22 to KVIA?

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1 A Oh, and at least in one case here we've
2 also got the rate card which is also used to raise
3 revenue for the station through the sale of
4 advertising -- as it's referred to, underwriting.
5 Underwriting but it is the sale of advertising.

6 Q Would you describe what a rate card is?

7 A Rate card is how much it costs an
8 advertiser to advertise on a radio station, TV
9 station, newspaper. Any advertising medium produces
10 a rate card and it's simply how much it's going to
11 cost you; it's what are our charges.

12 MR. SHORE: Has everyone seen the rate
13 card? It was on the very last page of the document.

14 JUDGE DREYFUS: Well, there's two pages of
15 the document.

16 MR. SHORE: Yes. One more document.

17 BY MR. SHORE:

18 Q Would you describe for the arbitrators
19 what that is?

20 A This is a book that's made available to
21 public radio.

22 Q And what is it?

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1 A It's a book. It's a book made available
2 to public radio that assists them in raising revenue
3 for the stations. It's a very good book as a matter
4 of fact. I know of a lot of commercial radio stations
5 that could stand to read this book as well.

6 It basically is a step-by-step guide to
7 what you need to do to put your product in the best
8 light, take it out to an advertiser and how to make
9 your presentation to the advertiser to bring back a
10 sale, essentially, to bring home money.

11 It talks about how you should price your
12 product, how you can go about figuring where you fit
13 compared to commercial stations in the market as to
14 using Arbitron ratings -- which are the same ratings
15 that commercial stations use to sell advertising.

16 It talks about how you can prepare a rate
17 card, it goes in -- even was an example I saw in here
18 of a, what's called a grid card. A grid card came
19 about in the late '70s in radio when radio stations
20 began to realize that there's no reason they should be
21 charging one rate all year long. There are periods of
22 peak demands and slack demand just like with an

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1 airline -- peak and off-peak.

2 By using a grid card, when it gets close
3 to Christmas you can say, well there's a lot of people
4 advertising right now, they're having a lot of
5 availabilities, so our rate is now this. And they
6 circle the rate from that grid.

7 This takes you through how to produce
8 that. It talks about things such as cost per point
9 which to the advertiser is, how many dollars they're
10 going to pay per head to reach that audience. Or
11 actually, it's per rating point which is a
12 representation of how many heads are out there
13 listening.

14 It tells you how to connect with clients,
15 what a big business is looking for when you go to see
16 them, what a small business would be looking for when
17 you go to see them. Literally, a step-by-step guide
18 on how to sell advertising and raise revenues for your
19 radio station.

20 Q Do you have an understanding as to what
21 the demographics are of the listeners of these 640
22 large stations?

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1 A It varies from station to station, and I
2 haven't had a chance to look at the exact demographic
3 breakdowns of the stations myself through the rating
4 books. But I have been able to look at what the
5 stations have made available. And the stations speak
6 of an upscale audience, 25 to 54, higher earning
7 potential.

8 I think there's one in the exhibits that
9 said it pretty well. Just a second; see if I can find
10 it here. Here it is.

11 KANU -- it's Exhibit 61593. KANU offers
12 underwriting announcements to reach an affluent, well-
13 educated audience with a factual and formative message
14 describing your business' products or services. That
15 one said an "affluent, well-educated audience", and
16 that is repeated time and time again as you go through
17 the Web sites or if you receive the program guide from
18 your local public station.

19 Q Would you describe these 640 stations as
20 competitive in their respective markets?

21 A They're very competitive. Of course it
22 will depend on the individual station. Some of these

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1 are very well managed stations and some of these are -
2 - just like in any business -- are not as well
3 managed.

4 But by-and-large they tend to be quite
5 competitive in the market, the ratings that I have had
6 a chance to look at -- and I do do get to get at the
7 12plus ratings even though I don't get the demographic
8 breakdowns -- they would tend to fall into the mid-
9 pack.

10 Our station, WPLN in Nashville which
11 follows the basic formula -- news in the morning,
12 afternoon, music mid-days and at night -- generally
13 gets in the neighborhood of about a three-and-a-half
14 share. That's three-and-a-half percent of the
15 audience on average, Monday through Sunday, 6 AM to
16 midnight, over the age of 12. Which is enough to make
17 it a very -- let's put it this way, it's got the same
18 audience as our two news talk stations, which are
19 commercial: WLAC and WWTN-FM. So it would be quite
20 competitive.

21 Q Incidentally, I skipped a question before.
22 You described the programming that these stations are

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1 picking up from NPR and other sources. Are they
2 getting the programming for free?

3 A Some of the programming they do, in fact,
4 get for free. Some of the programming is available to
5 them at no charge and that may be made available to
6 them because the station just wants to get it out, or
7 sometimes that's because another station is supplying
8 that programming, has underwriting credits of its own.

9 In effect becomes the same as -- it's very
10 common in commercial radio of barter. You're carrying
11 our underwriting credits so it's worth us to get wider
12 distribution for our underwriting credits; we won't
13 charge you.

14 The more successful a program is then you
15 begin to be charged. Anything -- NPR charges you a
16 fee to become part of their satellite interconnect and
17 another fee just to carry their programming. PRI
18 charges fees the same way. And there's also a fee for
19 much of the independently produced programming as
20 well.

21 Q Could you please describe -- you address
22 it in your written testimony -- the phenomenon of

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1 networks within the group?

2 A Well, networks within the group or
3 sometimes the lines blur between networks and groups.
4 They are putting together multiple transmitters.
5 Sometimes they are a combination of license
6 transmitters and what's called a translator; which is
7 a very low power FM radio station, licensed completely
8 different than the main channel because they are low
9 channel and they're used to fill in pockets.

10 And they will take and string together
11 groups of stations to reach a larger area, such as
12 Minnesota. Public radio covers almost all if not all
13 of Minnesota plus parts of neighboring states and even
14 Sun Valley, Idaho, because as I understand, they like
15 to ski there.

16 We also have them in Mississippi,
17 Mississippi Public Radio, South Dakota, Georgia --
18 these are all areas where there are state-wide
19 networks. Xavier University in Cincinnati has an
20 extensive network of stations as well. In fact, they
21 just added another one to it last week. They took a
22 commercial station and converted it to public -- as

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1 they've done a couple of times before -- to carry
2 their programming.

3 But it's a way to extend your reach to
4 cover a larger area -- more people.

5 Q And what effect if any, does this have on
6 their ability to compete in a particular market -- or
7 network station?

8 A It helps them considerably because the
9 more reach, the more audience you have the better.
10 It's also better for the listener because the further
11 you go, if you put out a good product more people can
12 enjoy that quality product.

13 But in the case of many of these, they are
14 actually doing what few commercial broadcasters have
15 been able to do -- because of costs of entry or
16 because they haven't caught on to it yet -- which is
17 to service entire regions.

18 Minnesota Public Radio covers more people
19 in Minnesota than any commercial broadcaster does.

20 MR. SHORE: I have no further questions at
21 this point. I would just move in the Exhibits that
22 have been put before the panel and the Exhibits from

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1 which they're derived, which are the larger ones that
2 have been submitted by ASCAP.

3 MR. STEIN: I'll lodge an objection to
4 moving in those Exhibits.

5 MR. KLEINBERG: I'm sorry, I couldn't --

6 CHAIRPERSON GRIFFITH: He's lodged an
7 objection --

8 MR. STEIN: I'll lodge an objection to
9 moving those exhibits --

10 JUDGE GULIN: First of all, the Exhibits
11 we're talking about are the ones you just --

12 MR. SHORE: The Exhibits I'm talking about
13 -- these were excerpts from the actual Exhibits which
14 you all have right now. We move in the whole
15 Exhibits. I just brought this material before you so
16 that you could see particular instances that he's
17 referring to.

18 CHAIRPERSON GRIFFITH: The whole Exhibits
19 being the ones which were filed in support of his
20 direct testimony?

21 MR. SHORE: Correct.

22 CHAIRPERSON GRIFFITH: Okay.

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1 JUDGE GULIN: And the basis for the
2 objection?

3 MR. STEIN: The basis for the objection is
4 that many of these documents, the witness -- we
5 haven't heard the testimony, but he's not created
6 them, he hasn't identified their authenticity. I'm
7 not speaking with respect to documents which may be
8 NPR documents, but as to everything else, we don't
9 think as an expert, if he's relied upon them he's
10 allowed to vouch for their authenticity and move them
11 into evidence. They're hearsay.

12 JUDGE GULIN: Now, these are all documents
13 that I assume Ms. Grajeda has already testified to us
14 in the matter they were obtained?

15 MR. SHORE: These were actually sponsored
16 initially by Mr. Unmacht as listed in his written
17 direct testimony. This is exactly the type of
18 material an expert relies upon in forming opinions
19 about the operations of the stations.

20 MR. SCHAEFFER: And Ms. Grajeda did
21 testify --

22 JUDGE GULIN: As how they were obtained,

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1 yes.

2 MR. SCHAEFFER: There's been no objection
3 made prior to this time.

4 CHAIRPERSON GRIFFITH: I understand.

5 JUDGE GULIN: To clarify the status, these
6 are actually already incorporated into the record.
7 Now, there's a motion pending to strike these
8 documents and others, so in essence what we're being
9 asked to do is rule on that portion of the motion to
10 strike, is that correct -- the correct procedural
11 posture?

12 MR. SHORE: Correct. If I could read in
13 the numbers so at least we know for the record what
14 we're talking about --

15 MR. SCHAEFFER: The only difference being,
16 these were specifically mentioned in --

17 CHAIRPERSON GRIFFITH: We understand.

18 MR. SHORE: I'm talking about Exhibits --

19 MR. STEIN: And I objected.

20 MR. SHORE: I'm talking about Exhibits 506
21 and 507, 520, 523, 601 through 622, 711 --

22 JUDGE GULIN: Okay, you're going to have

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1 to slow down -- it's 506, 507 --

2 MR. SHORE: And 520, 523, 601 through 622,
3 711, 714 through 719, 323, 312, 320 and 321, 615, 617,
4 714. I believe that's it. And as Mr. Unmacht
5 testified, these are materials that he reviewed in
6 forming his opinions about the operations of the
7 station. Its independents.

8 MR. RICH: To the extent it might clarify
9 the nature of our objection -- I don't know if there
10 is any ambiguity -- we have no objection to Mr.
11 Unmacht relying on anything he wants in formulating
12 his opinion. There was no objection to his testimony
13 of the opinions he formed.

14 That to us, is a very separate issue from
15 whether the statements made in the document written by
16 PRI, for example, making numerous factual allegations.
17 This witness we assume, has no independent basis for
18 knowing the accuracy of those underlying statements
19 within the documents themselves. That's the --

20 JUDGE DREYFUS: Well, you would ask him
21 that on cross examination.

22 MR. RICH: We were prepared to do that, of

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1 course, but also they moved the documents in evidence;
2 hence, we restated our objection to their
3 admissibility.

4 CHAIRPERSON GRIFFITH: Yes?

5 MS. WILLET: If I may just make one point.
6 Under the Rules, 251.47(f), if the objections are
7 apparent from the face of the direct testimony --
8 which they were at the time of the submittal on
9 October 1 -- those objections must have been made at
10 the appropriate time back in November or they're
11 waived. And the Rules clearly provide that.

12 MR. SHORE: And in fact, when the motion
13 was made to strike Ms. Grajeda's material there was a
14 specific exception carved out by Public Broadcasters
15 with respect to documents which were sponsored by
16 experts. Which is exactly the distinction that was
17 brought up yesterday between someone who is an expert
18 in the industry and relies on this material, and
19 someone who may just have information about the
20 authenticity of documents.

21 JUDGE GULIN: Well, as we discussed
22 yesterday, there was a motion filed, but it was

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1 essentially referred to the panel. So I think there
2 was a ruling made. I'm not sure that timeliness is an
3 issue as to the objection.

4 MR. SHORE: Only with respect to that
5 motion -- which was a motion to strike those exhibits
6 -- they explicitly said in that, we are not moving to
7 strike the materials relied upon by the experts
8 referenced in their direct testimony. Now they are
9 making a new motion. This is not a renewal of a
10 motion which was previously made.

11 CHAIRPERSON GRIFFITH: Do you --

12 MR. WEISS: The one we're talking about?
13 The motion dealing with Ms. Grajeda that was filed
14 back in November dealt with the issue that we
15 discussed yesterday -- principally -- essentially that
16 she was not an appropriate sponsoring witness.

17 JUDGE GULIN: I understand. But he's
18 saying that there were some -- you carved out an
19 exception in --

20 MR. WEISS: We did not list her as -- we
21 did not include in that motion exhibits that were
22 listed by other witnesses on the grounds that they

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1 were a proper sponsoring witnesses. And I don't think
2 you're hearing us argue now that Mr. Unmacht would be
3 an improper sponsoring witness to documents that we're
4 referring to.

5 The objections that we're raising are
6 somewhat different and go to the more substantive
7 elements as to how these documents come into evidence
8 at this stage. I don't believe that we've waived any
9 rights to argue as to the hearsay nature of these
10 documents or his competence to offer them into
11 evidence for any other purpose other than to establish
12 that these are documents he relied on in forming his
13 opinion.

14 CHAIRPERSON GRIFFITH: Well, Mr. Stein
15 indicated that his objection was on the basis of
16 hearsay, is that correct?

17 MR. STEIN: Correct.

18 CHAIRPERSON GRIFFITH: Okay. Ladies and
19 gentlemen, the objection is overruled. The motion to
20 strike the documents which was posed yesterday to the
21 extent that they pertain to these individual documents
22 just numbered, is denied.

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1 All right.

2 MR. RICH: May we inquire just for a
3 clarification from the panel, the purpose for which
4 they're being admitted? Are they being admitted for
5 the truth of their content or as documents on which
6 the expert relied?

7 CHAIRPERSON GRIFFITH: The documents on
8 which the expert relied, as far as I'm concerned.

9 MR. SCHAEFFER: I think --

10 MR. SHORE: Let me just read from their
11 motion. "Again, we would note that the Public
12 Broadcasters" -- this is the motion to strike Ms.
13 Grajeda's testimony -- "Again we would note that the
14 Public Broadcasters are not seeking to strike
15 documents sponsored by Ms. Grajeda which, although
16 arguably hearsay, have been relied upon by other ASCAP
17 witnesses because the Public Broadcasters will have
18 the opportunity to cross examine these other witnesses
19 as to the veracity, relevance, or reliability of the
20 statements reflected in such documents."

21 CHAIRPERSON GRIFFITH: That's what we
22 agreed.

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1 MR. SCHAEFFER: Well, but therefore the
2 issue there into their own. The fact that they're
3 hearsay is irrelevant except in evaluating the
4 credibility --

5 CHAIRPERSON GRIFFITH: And they cross
6 examine and --

7 MR. SCHAEFFER: Yes.

8 MR. SHORE: As to weight.

9 MR. RICH: Very well, we'll cross examine.
10 May we -- with apologies, because we have a few notes
11 that we haven't sifted from our claim -- may we have
12 three to five minutes before we begin cross?

13 CHAIRPERSON GRIFFITH: Sure. Okay, we'll
14 take a brief recess.

15 (Whereupon, the foregoing matter went off
16 the record at 10:36 a.m. and went back on
17 back on the record at 10:43 a.m.)

18 MR. SHORE: This is a preliminary matter.
19 We now have copies of ASCAP Hearing Exhibit 1. I'm
20 giving one to the court reporter to have it marked as
21 the official Exhibit.

22 (Whereupon, the above-referred

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1 to document was marked as ASCAP
2 Exhibit No. 1 for
3 identification.)

4 CHAIRPERSON GRIFFITH: All right. Thank
5 you. Mr. Shore, do you intend to hold up the
6 testimony of this witness while we read this book, or
7 are you ready to proceed?

8 MR. SCHAEFFER: Depends on what the result
9 is of your reading the book.

10 CHAIRPERSON GRIFFITH: Thank you. Mr.
11 Kleinberg, do you have any questions, sir?

12 MR. KLEINBERG: Yes, I have a couple of
13 questions, if I could.

14 CHAIRPERSON GRIFFITH: All right.

15 DIRECT EXAMINATION

16 BY MR. KLEINBERG:

17 Q In your direct testimony on page 14, I
18 just wanted to make sure I understood something. You
19 testified that member stations buy programming from
20 NPR, and they can also buy it from PRI?

21 A Yes.

22 Q And you indicated in your testimony that

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1 NPR and PRI charged for their programs to the stations
2 based upon stations and their various revenues? Am I
3 reading that correctly? At the top of the page.

4 A It's my understanding of that.

5 Q Thank you. And you also indicated that
6 NPR stations compete in the market, I believe you said
7 on direct.

8 A Yes.

9 Q And am I correct that a public radio
10 station with let's say, a classical format, compete
11 for audience share with commercial stations with a
12 classical format within the same market?

13 A Well, they could compete for audience
14 share with all stations on the dial. And all
15 commercial stations can compete with public stations.
16 There's no special button that you have to push on the
17 faceplate of a radio that says, take me to the public
18 stations.

19 To most people it's just one, continuous
20 tuning dial and they don't know the difference between
21 the station at 89 and a station at 107. So yes,
22 they're all competing against each other.

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1 MR. KLEINBERG: Thank you. No further
2 questions.

3 CHAIRPERSON GRIFFITH: All right. Mr.
4 Stein.

5 CROSS EXAMINATION

6 BY MR. STEIN:

7 Q Good morning, Mr. Unmacht. You state that
8 there currently appears to be about 707 I believe, in
9 your testimony, public radio stations which are
10 eligible to receive CPB funding?

11 A There -- no, no. There are approximately
12 -- that number that appeared to qualify for this
13 proceeding, this is based on CPB's list and this is
14 based on NPR's list, which also showed NPR stations
15 were CPB-qualified but not taking money. But this
16 list does not take into account those stations -- nor
17 did I try to find for this -- those stations that
18 could be CPB-qualified and could become NPR members.

19 Q But your understanding is that -- at least
20 for the university you analyzed -- it consists of 707
21 stations, correct?

22 A Yes, based on the criteria for being party

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1 to this, these are the ones that qualified.

2 Q Okay. And I believe you testified that
3 about 275 of those stations are basically stations
4 which simulcast or relay programming from another
5 station, correct?

6 A Correct.

7 Q So in some cases these 275 stations
8 basically consist of an additional transmitter, which
9 is erected someplace and is rebroadcasting the fare of
10 another station, correct?

11 A May be as simple as that; may be more
12 complicated.

13 Q But in some cases it's as simple as that?

14 A In some cases it's as simple as that.

15 Q And these stations, these 275, comprise
16 almost a third of the network -- or, let me not say
17 network -- a third of the universe of stations that
18 you were analyzing?

19 A Yes, they really consist of a service, a
20 number -- in this case these additional transmitters
21 have call letters. Other stations on this list may
22 have a large number of transmitters as well, but if

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1 they're called translators then they wouldn't appear
2 on this list and would not have call letters as we
3 know and love them. So it's a question of covering a
4 given area using multiple transmitters or a single
5 transmitter.

6 Q Okay, so 275 of these "stations" are
7 basically consisting of transmitters?

8 A No. Just a minute ago we said it could be
9 as simple as that, but many have full-blown studios,
10 local staffs, and do local inserts. We're saying the
11 majority of their day is coming from this other
12 station. We're not saying 100 percent of their day is
13 coming from it.

14 Q Now, in addition, it's correct isn't it,
15 that about two-thirds of these 707 stations are
16 licensed to colleges and universities, correct?

17 A I've not done a study of the actual
18 ownership of the stations. Some are owned by
19 colleges, universities; some are owned by local
20 groups; some are owned by high schools; some are owned
21 by public -- I don't know what the makeup is.

22 Q But comparatively speaking, the ownership

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1 of these public radio stations is quite different from
2 their commercial counterparts, correct?

3 A Yes, they have to be not-for-profit
4 organizations, so a for-profit company like CBS could
5 not own a public station because they distribute their
6 profits.

7 Q And most of the commercial stations in the
8 country are not owned by colleges and universities,
9 correct?

10 A Most of them are not; some are.

11 Q Now, every one of these 707 stations, as
12 I think you testified to, operate under FCC non-
13 commercial licenses, correct?

14 A As far as I know, they are all operating
15 under FCC non-commercial licenses.

16 Q So by definition, they are subject to a
17 different set of licensing criteria and FCC
18 regulations than commercial rating decisions, correct?

19 A There are some differences. Most of the
20 rules are the same.

21 Q But there are differences?

22 A Yes, there are differences.

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1 Q For example, there are underwriting rules
2 which apply to public radio stations which do not
3 apply to commercial radio stations, correct?

4 A Sure; and there are some others.

5 Q There are others?

6 A Yes. Minimum hours would be one of them.

7 Q I think you mentioned that the FCC doesn't
8 restrict the type of programming that appears on
9 either commercial or non-commercial radio.

10 A Correct.

11 Q But you have an extensive amount of
12 analysis that's based on an examination of the type of
13 formats, correct, which appear on public radio
14 stations?

15 A Yes.

16 Q And I think you note on page 9 of your
17 testimony, that about two-thirds of those stations
18 limit their programming to six formats: those are
19 news, jazz --

20 A I didn't say -- excuse me -- not limit,
21 but primarily do.

22 Q Okay. And those are news, jazz,

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1 classical, talk, variety, and alternative, correct?

2 A Correct.

3 Q And you've broken that down with a little
4 more specificity in your testimony, haven't you, in
5 terms of the types of formats that are being broadcast
6 by these stations?

7 A We've categorized each of them, yes.

8 Q So as I look at it, you note that about
9 640 of the 707 stations -- and you've described this -
10 - are day parting -- I'm sorry, are day parting
11 between either broadcast -- I'm sorry, news and talk
12 programs, news and music programs, or just music,
13 correct?

14 A Yes.

15 Q Okay, so we've got those three categories,
16 correct?

17 A Three broad categories, yes.

18 Q Let's talk for the moment about news. On
19 page 11 you note that the largest subset of these
20 three types of formula stations -- I think it's 360
21 overall -- are day parting between news and music
22 programming, correct?

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1 A Yes.

2 Q Now, for this largest subset of stations
3 which are using the news and music day part formula,
4 it's correct that it's news and not music programming
5 that's being aired during the morning and evening
6 drive times, correct?

7 A No, that's not correct.

8 Q It's not news programming that's being --

9 A It -- it's informational programming.
10 News being our category, it's put in a general
11 category. But I can tell you as a listener to Morning
12 Edition, I've heard opera singers, music is used
13 between all features. I have heard -- I heard a
14 gentleman singing just yesterday, funeral songs.

15 Q Am I correct that you categorize it for
16 purposes of M Street as news programming?

17 A As news and information; that doesn't mean
18 no music.

19 Q I didn't ask you that, did I?

20 A Okay, that is for our purposes, we
21 categorize it --

22 Q As news programming?

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1 A Yes.

2 Q And as you described that it's in programs
3 such as Morning Edition and All Things Considered,
4 correct?

5 A Yes.

6 Q Okay. Now, can you explain what you mean
7 by morning and evening drive time?

8 A Morning and evening drive time -- there is
9 no firm rules as to what each day part is. There's an
10 informal guideline which says, morning drive is 6 to
11 10 AM, mid-day is 10 to 3 PM, 3 to 7 PM is PM drive --
12 evening drive time -- and 7 to midnight is nights, and
13 midnight to 6 is overnights.

14 But it varies from market to market. In
15 Los Angeles for instance, what we would call morning
16 drive basically now extends from about five in the
17 morning until 10 or 11. National is probably 7 to 9
18 AM. But that -- roughly it's the day part time of the
19 day.

20 Q And doesn't drive time essentially refer
21 to those portions of the day when the most viewers are
22 listening in to radio?

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1 A No, not anymore. Radio has changed.
2 There was a time when most people listened in the
3 morning and afternoon drive, but now if you take a
4 look at the ratings you'll find that the most
5 listened-to day part is morning drive followed by
6 Saturday mid-days, followed -- it depends on the
7 station but it's either going to be mid-days,
8 weekdays, or PM drive.

9 In the case of the station -- in some
10 stations it's PM drive, in many stations mid-day is at
11 or about the top -- if it hasn't topped on most -- as
12 the second most listened to.

13 Q Is it fair to say that morning and evening
14 periods are periods of heavy listenership to radio,
15 generally?

16 A Yes, as are mid-days. Days are heavy.

17 Q So what M Street characterizes as news
18 programming for purpose of its classification of
19 format, is what's being aired during these morning and
20 evening drive times on about 360 of these stations,
21 correct?

22 A Now, it may not be the entire time,

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1 morning and afternoons. I know some stations are out
2 of their news programming, if you will, by 8 AM.
3 Well, that's splitting morning drive between news and
4 music.

5 Q Okay, but you testified don't you, I mean,
6 you state --

7 A I'm using, as I said, morning drive, which
8 may be 5 to 8, it may be 5 to 10. Essentially, that
9 is what they're doing in the day part, but is it
10 exactly? Is everyone running the same hours on these
11 programs?

12 Q But essentially that's what's going on,
13 correct?

14 A But they may be day parting within that
15 time period as well. It's not going to change my
16 categorization. Mine's based on what are they doing
17 approximately these times, not what are they doing
18 exactly these hours, and it has to be off and it has
19 to be on at these given times. That's not the way we
20 do it.

21 Q I understand, but you put forth a day
22 parting analysis as part of your testimony.

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1 A Yes, in general. I'm just trying to keep
2 from misleading anyone into thinking that this
3 represents specific hours. It's in general.

4 Q In addition to these stations, there are
5 many stations which are airing exclusively news and
6 talk programming, correct?

7 A News, talk, information -- now exclusively
8 to the absence of all music, I don't know of any.
9 Because even WNYC in New York -- AM 820 which most of
10 the world would know is a news and talk station, still
11 Runs the Prairie Home Companion which is all about
12 music, on the weekends. So exclusively, probably not.
13 Primarily, yes.

14 Q But in your testimony you state that one
15 of the three categories of these formulas are stations
16 which run news and talk programming, correct?

17 A Yes, but I did not say --

18 Q That's the way you described it, correct?

19 A But did not say with the absence of music.

20 Q I didn't ask you that.

21 A Yes, you said all news.

22 Q Well, I'm just using the format

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1 definition. Let's just use --

2 A I'm trying to help you understand the
3 format definitions because you may be reading
4 something into them that isn't there.

5 Q You call them news and talk programs,
6 correct?

7 A Yes, but that does not mean to the
8 exclusion of.

9 Q And by definition I assume that these
10 stations are also airing news and information
11 programming during morning and evening drive times,
12 correct? Both these stations whose format are news
13 and talk programming?

14 A Yes, they -- yes.

15 Q Let's talk about the non-news programming.
16 First we have the subset of stations that are day
17 parting between news and music, correct?

18 A Yes.

19 Q Now, when those stations stop broadcasting
20 news and start broadcasting news formats, the majority
21 of them are broadcasting classical music, am I
22 correct?

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1 A I'm not -- I think classical beat out jazz
2 -- yes, classical beat out jazz. I don't have the --
3 there's a chart I did that shows how many are in each
4 one and I don't have that here to look at.

5 A But classical beat out jazz, correct?

6 A Classical beat out jazz.

7 Q In fact, to the extent that music is aired
8 at all on public radio -- and I think you stated there
9 are about 69 formats or so that air on public radio --
10 classical music is by far the most dominant format,
11 correct?

12 MR. SHORE: I'm just going to object to
13 format. Are we talking about the public radio
14 stations here or the 2,000 public radio stations?

15 THE WITNESS: Yes, there are two different
16 groups.

17 BY MR. STEIN:

18 Q Well, let's limit ourselves to the 707
19 here. Of those 707, by far the most dominant form of
20 music format programming is classical, correct?

21 A Correct.

22 Q And I assume that's not true in the

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1 commercial sector? In other words, the most dominant
2 form of music programming in the commercial radio
3 business is not classical music, is it?

4 A No. No, these stations can generally
5 drive them out.

6 Q But the commercial radio stations
7 throughout the country are not by-and-large,
8 broadcasting as their dominant music format, classical
9 music, correct?

10 A Correct.

11 Q Now, I think you also testified that over
12 the weekend periods some of these news and music
13 format stations change their formats, correct?

14 A Right.

15 Q And they shift away from music
16 programming, correct, towards news and talk
17 programming over the weekend, correct?

18 A Or the other way, in the case of WNYC.

19 Q Let me take a look at your testimony for
20 a moment. Do you say that in your testimony?

21 A I may not have added the second part but
22 it is also true. I don't recall saying -- but maybe

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1 I did -- that they may air more news programming. I
2 didn't say they gave up on music.

3 Q Where are you referring to? Let's take a
4 look. Take a look at page 11, paragraph 20. I think
5 you note -- and I'll just read it -- that they -- "as
6 stated in my summary of opinions the largest subset of
7 the formula stations, over 360, are distinguished by
8 their split programming, or day parting, between news
9 and music during the week and music, talk, and variety
10 over the weekends. That's what you say, correct?

11 A Yes, but --

12 Q It doesn't mention anything about shifting
13 towards music programming over the weekend, does it?

14 A No, it doesn't mention anything about
15 shifting towards talk, either. It says music, talk,
16 and variety. That's why I wanted to know where you
17 got that.

18 Q Now the third format type of station that
19 we talk about after you've got the news and music and
20 the all news and talk -- we're not saying exclusively
21 -- but the news and talk format stations are music
22 stations, correct?

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1 A Correct.

2 Q And again, on those stations, the dominant
3 music format is classical, correct?

4 A On the remaining stations I'm -- I would
5 suspect so but because that -- because the all news
6 groups is a much smaller group, the all music group is
7 also a smaller group than these that are doing the
8 mix. And I would say I think so, but I would have to
9 actually go back and look to be sure.

10 Q You don't have any reason to disagree with
11 that statement that on these music -- all music
12 stations --

13 A I'd have to look.

14 Q Let me just finish the question which is,
15 do you have any reason to disagree with the statement
16 that on these all music statements the dominant format
17 is classical music?

18 A I'd have to look.

19 Q Now you discuss radio formats, correct,
20 and the information in your database describes the
21 state of affairs in public radio in 1996, correct?

22 A No. the data that we worked on was from

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1 '97. The dollar figures were from '96.

2 Q So it's the state of the industry in 1997
3 with respect to formats?

4 A With respect to formats, yes.

5 Q It therefore does not permit us to examine
6 the changes in the format trends of public radio over
7 time, correct?

8 A That's correct.

9 Q Nonetheless, isn't it true that in fact,
10 the prevalence of news format programming in these 707
11 stations has increased over time?

12 A I'd have to agree with that.

13 Q During your direct testimony you talked
14 about Exhibit 312, these underwriting guidelines that
15 allows public radio, in your words, "compete with
16 commercial stations for audience revenue", correct?

17 A For advertising revenue.

18 Q In fact, public radio does not generate
19 revenues in the same manner as commercial radio, does
20 it?

21 A Yes. I mean, are the two identical, no.
22 But do they -- when they sell advertising, yes, it's

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1 advertising here, it's advertising here; that's the
2 same. Do commercial stations get to ask listeners for
3 dollars? Sometimes in the religious -- no, the
4 programs on religion say no, they don't get to. So
5 there are differences. But when they're selling off
6 a rate card -- I guess rate card would look the same
7 as a rate card for WABC in New York.

8 Q Well, they are subject, I think we
9 established, to FCC guidelines which control the
10 underwriting that's allowed to air on these public
11 stations, correct?

12 A There are differences, just as there are
13 differences in what radio stations -- commercial radio
14 stations sell based on fake guidelines, which is
15 another --

16 Q So the product you assert they're selling
17 -- these announcements which may appear during the
18 broadcast -- are not subject to the same regulations,
19 are they?

20 A They have to -- there are some limitations
21 on them.

22 Q Right, so that what is airing on a

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1 commercial station is not the same as what is airing
2 on the public radio station?

3 A That's not necessarily true. Best case in
4 point is Metro Traffic. They're the people who do
5 traffic for multiple stations in the market -- using
6 commercial and non-commercial -- and you will hear
7 something that goes, you know, "Traffic on the 101 is
8 heaving. Southwest Airlines flies 20 times to Dallas.
9 So take Southwest Airlines when you need to travel to
10 Dallas".

11 That exact same announcement is going to
12 air on the public station as is going to air on the
13 commercial station, and it's a barter arrangement.
14 They get the traffic for free in exchanging for airing
15 the commercial, and it's the same commercial that I
16 hear on WPLN in the morning that I hear on another
17 commercial radio station; both voiced by the same man.

18 Q Is it your testimony that most of the
19 types of advertisements which are appearing on
20 commercial radio appear on public radio?

21 A No, just that many are.

22 Q Have you done any analysis of that?

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1 A I'm a listener.

2 Q It's just based anecdotally on your
3 listening?

4 A It's based on hearing -- yes, based on
5 hearing the same thing on two stations.

6 Q Isn't it true that 47 USC, Section 399 --
7 and you may not be specifically familiar with
8 provision -- prohibits non-commercial stations from
9 "advertising"?

10 A Prohibits them from advertising?

11 Q Yes.

12 A You mean, going out and buying advertising
13 for themselves?

14 Q No, prohibits them from engaging in the
15 practice defined by the FCC as "advertising"?

16 A I don't know that section; I can't answer
17 that.

18 Q Let me direct your attention to Exhibit
19 312. I believe it's Appendix VI-3. Am I correct in -
20 - I'm sorry, if you need to --

21 JUDGE GULIN: That was roman numeral III-
22 12?

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1 MR. STEIN: Appendix -- roman VI-3, which
2 I think is at page -- I guess that's a page number to
3 that appendix.

4 JUDGE GULIN: I just want to make sure I'm
5 on the right page.

6 BY MR. STEIN:

7 Q Am I correct that this portion of the
8 document upon ASCAP 312, sets forth a guide to the
9 underwriting rules which public radio stations are
10 subject to?

11 A That's what it's titled, yes.

12 Q Let me just ask you to take a look at
13 appendix VI-9. That's a compendium, is it not, of
14 recent decisions by the FCC concerning the different
15 regulations which public, non-commercial radio
16 stations are subject to with respect to underwriting
17 credits, correct?

18 A Yes.

19 Q Now, the notion of the public radio
20 seeking support from the private sector is not a new
21 phenomenon in public radio, is it?

22 A No, just a growing one.

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1 A But it's --

2 A But not new.

3 Q In fact, it's gone back, probably to the
4 inception of public radio, hasn't it?

5 A I don't know.

6 Q But many, many year?

7 A Yes, but I don't know when.

8 Q Do you happen to know what percentage of
9 public income comes from radio underwriting?

10 A No, I don't.

11 Q And in addition to this underwriting,
12 public radio stations also raise money through
13 publicized membership drives, correct?

14 A Correct.

15 Q Where they solicit voluntary
16 contributions, correct?

17 A Correct.

18 Q That doesn't really happen in commercial
19 radio, correct?

20 A No.

21 Q Now, do you have an MBA, Mr. Unmacht?

22 A No.

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1 Q And you've never been employed at a bank
2 or investment bank or venture capital firm, or a
3 similar institution, correct?

4 A No.

5 Q You don't market yourself or M Street
6 Corporation as that type of firm, to be hired for
7 purposes of valuing or selling a radio station, do
8 you?

9 A We have been -- we have been asked to
10 value radio stations.

11 Q Give me an instance in which that
12 occurred.

13 A WHBQ, Memphis, for George R. Flinn.

14 Q And what was the nature of your consulting
15 activity in that case?

16 A To give an appraisal of the worth of the
17 station.

18 Q Let me turn your attention to some of the
19 documents which we looked at earlier. We're going to
20 start with the package which was labeled Exhibit --
21 beginning with 506, sub 7.

22 Let me first ask you to look at Exhibit --

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1 I'm sorry, do you happen to have a copy of the entire
2 exhibit which was moved into evidence by Mr. Shore in
3 front you or just the excerpts?

4 A No, I've just got the excerpts.

5 MR. STEIN: Okay. Do you happen to have
6 a full set of those exhibits?

7 MR. SHORE: I may.

8 JUDGE GULIN: We do here.

9 BY MR. STEIN:

10 Q Okay, let me direct your attention to 506,
11 page two. It's entitled Excerpts From Current.

12 A Uh-huh.

13 Q Okay, you did not create this document,
14 did you?

15 A I did not.

16 Q Okay. And you did not undertake any
17 independent efforts to verify the accuracy of the
18 information contained in this page, did you?

19 A Not on this page, no.

20 Q Okay. And Current is not, to your
21 knowledge, a publication of CPB, is it?

22 A I don't believe it is.

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1 Q Okay, and it's not a publication of NPR,
2 is it?

3 A No.

4 Q And it's not a publication of PBS, is it?

5 A No.

6 Q Let me direct your attention to Exhibit
7 506, sub 5. This is an article entitled PRI Gets
8 Jump on NPR in Weekend Distribution.

9 Do you see that article?

10 A Yes, I do.

11 Q Okay, you didn't write this article, did
12 you?

13 A No, I did not.

14 Q You don't know who wrote this article, do
15 you?

16 A No, I don't.

17 Q Okay. Did you independently seek to
18 verify the information in this article?

19 A No.

20 Q Let me direct your attention to 506, sub
21 10. And I'm looking now -- like to direct your
22 attention to the second, third, fourth -- it's the

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1 fifth full paragraph beginning "in choosing his
2 subjects."

3 A Uh-huh.

4 Q Where it says, "In choosing his subjects,
5 Roland was first of all limited by practical matters
6 such as uninterested artists managers or lack of
7 budgets to play the subjects. He approached several
8 musicians who didn't become subjects for various
9 reasons, including Joni Mitchell, Prince, Public
10 Enemy, REM and Stevie Wonder.

11 "A lot of the people we approached didn't
12 seem to see the value of having something on public
13 radio, Roland says."

14 And again, you didn't seek to
15 independently verify the accuracy of these statements
16 attributed to Mr. Roland, did you?

17 A No.

18 Q Okay. Now I'm going to talk off of some
19 of the documents which were packaged together by Mr.
20 Shore starting with Exhibit 617 to the first page.

21 I'm sorry.

22 You didn't create this article, correct?

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1 A Correct.

2 Q Now you'll notice that the last sentence
3 appearing on that page, it says "WBGO's final tally
4 was 504,000."

5 A Yes.

6 Q You didn't independently take efforts to
7 verify the accuracy of that figure, did you?

8 A No, I did not.

9 Q You didn't take efforts otherwise to
10 verify the accuracy of the other statements appearing
11 in this article, did you?

12 A Yes, we did because we wrote this also for
13 our own newsletter.

14 Q Can you describe what you mean by that?

15 A We publish a weekly newsletter that deals
16 with weekly news. This was -- I had gotten a mailing
17 from the station announcing that we're going to do it,
18 so we covered it.

19 Q Okay, but you didn't -- did you undertake
20 to verify the accuracy of all of the statements
21 contained in this article?

22 A No, you said -- I thought you said some of

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1 them. Yes, we did, some of them; but not all of them.

2 Q Okay. Now let me direct your attention to
3 Exhibit 615, sub 13, which purports to be a list of
4 underwriters for radio station KMUD. Did you
5 undertake any efforts to independently verify that
6 this list is complete?

7 A No.

8 Q Or that in fact each of these individuals
9 is an underwriter of KMUD?

10 A No.

11 Q Let me direct you to the end of that
12 exhibit, pages 615, 137 and 138, the rate cards which
13 Mr. Shore alluded to in his direct testimony.

14 A Yes.

15 Q Did you undertake any --

16 JUDGE DREYFUS: I'm sorry?

17 MR. STEIN: I'm sorry, 137 and 138.

18 BY MR. STEIN:

19 Q You didn't create this document, correct?

20 A Correct.

21 Q And did you undertake any efforts to
22 independently verify that in fact these rates were

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1 being offered?

2 A No.

3 Q Now I'd like to direct your attention to
4 Exhibits 600 through 614.

5 MR. STEIN: Chris, I'm not sure if you
6 actually presented any of these documents.

7 MR. KLEINBERG: I'm sorry, what was the
8 number?

9 MR. STEIN: 600 through 614.

10 MR. MOSENKIS: Do you need another set?

11 MR. SHORE: No, we have a set, but the
12 witness needs one.

13 JUDGE DREYFUS: Off the record.

14 (Whereupon, the foregoing matter went off
15 the record briefly.)

16 JUDGE DREYFUS: What number?

17 MR. STEIN: We could start with Exhibit
18 600, which is just a one page document entitled Top
19 Producing Public Radio Stations.

20 CROSS EXAMINATION (continued)

21 BY MR. STEIN:

22 Q Do you see that document?

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1 A Yes, I do.

2 Q Did you prepare this chart?

3 A No, I did not.

4 Q Okay, did you check the accuracy of each
5 of the entries reflected on it?

6 A No, I did not.

7 Q Are you familiar with how the underlying
8 data were compiled?

9 A No, this was not a chart I used.

10 Q You had no involvement in preparing the
11 underlying data, did you?

12 A I had no involvement with this chart
13 whatsoever until now.

14 MR. STEIN: I'm correct that you did seek
15 to move this exhibit in with the Arbitrators, correct?

16 MR. SHORE: I think it was.

17 MR. STEIN: We'll move to strike that
18 based upon the testimony of Mr. Unmacht.

19 CHAIRPERSON GRIFFITH: Is it document 600?

20 MR. STEIN: Correct.

21 CHAIRPERSON GRIFFITH: I had him starting
22 with 601 through 622.

1 JUDGE GULIN: That's what I thought.

2 MR. STEIN: Okay, I apologize.

3 BY MR. STEIN:

4 Q Let me turn to 601 through 614 which -- if
5 you can just look at them, they purport to be
6 financial statements from various public radio
7 stations or similar reports.

8 Okay, you did not prepare these documents,
9 did you?

10 A No, I did not.

11 Q And you did not seek to independently
12 verify the accuracy of the information contained in
13 these documents, did you?

14 A No.

15 Q Okay.

16 MR. RICH: May we have one more minute?

17 CHAIRPERSON GRIFFITH: Okay.

18 MR. RICH: Thank you.

19 BY MR. STEIN:

20 Q Are you aware that, in fact, the satellite
21 interconnection service, which you've discussed
22 before, is not owned by NPR?

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1 A I know NPR administrates it and runs it.
2 If they -- I don't know the exact ownership of it.

3 Q Okay. And are you familiar with the rules
4 which determine access to that satellite system?

5 A Only through my friends who work there,
6 not formally.

7 Q Okay, so you don't know whether or not in
8 fact NPR -- strike that question.

9 And you would defer to others with more
10 knowledge about how that system operates, is that
11 correct?

12 A Yes, other than to what I had previously
13 said, which is that stations that are members have
14 access to it.

15 Q Do you know if non-members have access to
16 the satellite service?

17 A Yes, that is done -- it is my
18 understanding that's done as a for profit service that
19 brings in revenue for NPR. I know that Howard Stern
20 made use of it for distributing his show.

21 Q Okay, what's the basis for your
22 understanding in that regard?

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1 A Being down there while it was aired.

2 MR. STEIN: We have no further questions,
3 Your Honor.

4 CHAIRPERSON GRIFFITH: All right, any
5 redirect?

6 MR. SHORE: If we could take the
7 midmorning break at this point just to collect
8 questions. I have a number of people here.

9 CHAIRPERSON GRIFFITH: All right, we'll
10 take our morning recess. About ten minutes, please.

11 MR. SHORE: Thank you.

12 (Whereupon, the foregoing matter went off
13 the record at 11:24 a.m. and went back on
14 the record at 11:37 a.m.)

15 MR. SHORE: Just a few questions.

16 CHAIRPERSON GRIFFITH: All right.

17 REDIRECT EXAMINATION

18 BY MR. SHORE:

19 Q Mr. Unmacht, I believe you testified --

20 A Chris, can I clarify one thing I said
21 last?

22 Q Sure.

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1 A I just want to say Howard Stern and the
2 satellite interconnect system, that includes the --
3 part of that interconnect system is fiber optics
4 between Washington, D.C. and New York.

5 I don't know if they used the satellite
6 portion; I just know they used the fiber portion. So
7 I just wanted to -- didn't want to mislead that.

8 Q Thank you.

9 CHAIRPERSON GRIFFITH: All right.

10 BY MR. SHORE:

11 Q I believe you said you're a listener of
12 All Things Considered in morning edition?

13 A Yes.

14 Q I'm going to hand you a series of
15 documents, three documents that were from ASCAP
16 Exhibits 320 and 321. I believe there was a question
17 asked on music use on All Things Considered in morning
18 edition.

19 If you would look at this, and paying
20 particular attention to the listing of music
21 interludes in between the information or news
22 segments.

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1 Is this generally consistent with your
2 experience with these news programs?

3 MR. STEIN: I'll object to that. I don't
4 believe I asked the witness about music use on these
5 programs.

6 CHAIRPERSON GRIFFITH: On these particular
7 programs --

8 MR. STEIN: Correct.

9 CHAIRPERSON GRIFFITH: -- you're referring
10 to?

11 Do you have any comments?

12 JUDGE GULIN: These were documents that
13 were not alluded to in the written direct testimony?

14 MR. SHORE: They are indeed --

15 JUDGE GULIN: They are?

16 MR. SHORE: -- supporting the position
17 that even a program like All Things Considered
18 contains music, which was also the subject of cross
19 examination.

20 CHAIRPERSON GRIFFITH: Where is that, Mr.
21 Shore, just roughly?

22 MR. SHORE: I believe it was in a

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1 footnote. It's actually page 14, paragraph 26.

2 CHAIRPERSON GRIFFITH: Okay, that's what
3 I have right here.

4 MR. SHORE: "This is not to say that talk
5 stations do not play music. Programs like All Things
6 Considered often offer music as interludes between
7 news segments as demonstrated in ASCAP Exhibits 320
8 and 321."

9 JUDGE GULIN: So the objection is it's not
10 within the scope of cross?

11 MR. STEIN: That's correct. And he didn't
12 elicit any testimony regarding that issue on direct,
13 I might add, in the record.

14 CHAIRPERSON GRIFFITH: The objection is
15 overruled.

16 If you want recross examination on the
17 document, you may.

18 BY MR. SHORE:

19 Q The question was, is this consistent with
20 your personal experience in listening to news programs
21 like All Things Considered --

22 A Yes, it is.

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1 Q -- on NPR stations?

2 And what you're listening to on any given
3 day in your station in Nashville, is it your
4 understanding that that is also being broadcast to the
5 other stations in the country that are carrying All
6 Things Considered?

7 A Most of it, not all of it, because the
8 programs use cutaways. And at times, our local
9 station will insert a segment that was locally
10 produced over a segment that's used on the network.
11 But substantially they're the same.

12 Q Now during cross examination, you had
13 mentioned that NPR affiliated stations drive out
14 commercial stations in the market. Can you give us
15 some examples of what you meant?

16 A This niche works very well as one that we
17 specified, I think, in the testimony in Denver where
18 the public station is soundly beating in the ratings
19 -- the commercial classical station in Denver.

20 In San Francisco, there was a
21 Westinghouse, now CBS, decided to put an upscale news
22 program on the station they had just acquired on FM.

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1 And from the people I have talked to, and from my own
2 analysis, it would appear that they didn't take into
3 account that KQED was already there and already had
4 about two, three percent of the market.

5 And they wondered why they weren't getting
6 any listeners because they had formidable competition
7 that was already there, and they have since changed
8 formats.

9 So this -- the classical, jazz, upscale
10 news information lifestyle type of programming that is
11 offered is very, very well done and very difficult to
12 compete against.

13 Q Okay. Finally, there were a number of
14 references to documents that Mr. Weiss had taken you
15 through, and he had asked you questions about whether
16 you had independently verified some of that
17 information.

18 Now some of that information was, am I
19 correct, from the Web sites of the individual stations
20 --

21 A Yes.

22 Q -- being licensed in this proceeding?

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1 A Yes.

2 Q And some of the information is the public
3 financial statements published by the stations which
4 are being licensed in this proceeding?

5 A Yes.

6 MR. SHORE: I have no further questions.

7 CHAIRPERSON GRIFFITH: All right.

8 MR. SHORE: Oh, I apologize. Mr.
9 Schaeffer does remind me. There was a reference to
10 the Current legend. If I might borrow your exhibit on
11 that. I apologize.

12 MR. SCHAEFFER: It's 505, Chris.

13 MR. SHORE: Here we go. I'd just like to
14 have the record reflect though when those questions
15 were raised, that Current is published 23 times a year
16 as an independent journalistic service of the Current
17 publishing committee administered by Educational
18 Broadcasting Corp., WNET -- the founding stations,
19 WNET, New York, Maryland Pay TV or public TV, WGBH in
20 Boston, WCNY in Syracuse, WNEB in Buffalo, WTTW in
21 Chicago, KQED in San Francisco, KCET in Los Angeles,
22 WETA in Washington, and WOSU in Columbus, which are

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1 all stations being licensed in this proceeding.

2 MR. RICH: Your Honor, shouldn't this
3 belong in post trial submissions and not statements in
4 the middle of cross's and redirect's?

5 MR. SCHAEFFER: Well, Your Honor, I guess
6 practice everywhere is different. Maybe Mr. Rich's
7 practice is different than mine; but in non-jury
8 cases, we have often pointed out comments at the
9 conclusion and during the course of a witness'
10 testimony to show what a document says. Even the jury
11 can read the document.

12 CHAIRPERSON GRIFFITH: And we can read the
13 documents also.

14 MR. SCHAEFFER: Well, I just think if we
15 do it in context, Your Honor, it saves a little time.

16 CHAIRPERSON GRIFFITH: Do you object to
17 it?

18 MR. RICH: It's done.

19 CHAIRPERSON GRIFFITH: The objection is
20 sustained. Okay, the objection is sustained.

21 Mr. Kleinberg?

22 MR. WEISS: May I ask a question, please?

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1 Could I have back my exhibit?

2 MR. SHORE: Which one, this one?

3 MR. WEISS: No, the other one, 505.

4 MR. SHORE: You certainly may.

5 DIRECT EXAMINATION

6 BY MR. KLEINBERG:

7 Q Mr. Unmacht, you're familiar with a
8 periodical called Current?

9 A Yes.

10 Q Is that something that in the course of
11 your work at M Street that you have occasion and
12 others at M Street have occasion to read as part of
13 your --

14 A We do not subscribe to Current.

15 Q Do you ever see it?

16 A I see articles that are sent to me in
17 reference to something that we're working on. A
18 station will send it or it will be forwarded to me.
19 We have a lot of clippings that are sent, but we don't
20 subscribe to Current.

21 Q Do you have an understanding as to who
22 publishes Current?

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1 A Only from what Chris just read.

2 (Laughter.)

3 Q Take a look, if you would, at the exhibit
4 that you were questioned about. I don't know if you
5 have it up there, 505?

6 A Yes, I do.

7 Q Six, I'm sorry, 506. It's 506-2. And you
8 see there's a list of stations or entities that were
9 read to you before?

10 A Yes.

11 Q Do you know what kind of entities or
12 stations those are that are listed?

13 A Television stations, although some of them
14 also have radio associated with them.

15 Q What kind of television stations,
16 commercial or noncommercial?

17 A Those are public television stations.

18 MR. KLEINBERG: Thank you.

19 CHAIRPERSON GRIFFITH: All right.

20 Anything further?

21 MR. STEIN: No.

22 CHAIRPERSON GRIFFITH: All right, sir,

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1 thank you very, very much. You may step down. You're
2 free to go.

3 (The witness was excused.)

4 All right, Mr. Schaeffer, who is your next
5 witness, sir?

6 MR. SCHAEFFER: Yes, our next witness is
7 -- we're calling in James Day.

8 Mr. Day, would you take the hot spot,
9 please?

10 CHAIRPERSON GRIFFITH: Right over here,
11 sir.

12 Whereupon,

13 JAMES DAY

14 was called for examination and, after have been first
15 duly sworn, assumed the witness stand, was examined
16 and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. SCHAEFFER:

19 Q Mr. Day, would you state what city you
20 live in?

21 A New York City.

22 Q And would you tell us briefly what your

1 background is in public television?

2 A I came to Public Television in 1952, a
3 year after the FCC reserved the channels for what was
4 then called Educational Television. I was invited by
5 a community board in San Francisco to put one of the
6 first public stations on the air.

7 It probably is important to note that when
8 I was invited to put this station on the air, there
9 was no station there; there was simply a channel
10 allocation. There was no money, no equipment and no
11 staff, so I had to begin from ground zero.

12 The station went on the air in 1954 as the
13 sixth of the public television stations to go on the
14 air. And I remained as president of KQED -- I gave it
15 its name, incidentally -- for 15 years until I was
16 invited to become president of what was then the
17 National Public Television Network, National
18 Educational Television, NET.

19 And I came to New York at that point as
20 president of NET, the third president. At about that
21 time, the Corporation for Public Broadcasting was
22 getting underway. And under pressure, the NET was

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1 merged into Channel 13, which was then WNDT.

2 And in the merger, I was the surviving --
3 so-called surviving president. Changed the call
4 letters from WNDT to WNET in order to preserve the
5 value of the NET name.

6 I remained as president of WNET Channel 13
7 until 1973 when I resigned. For a year I did a
8 syndicated television program as an interviewer of
9 famous people. Ran on 45 PBS stations. And then I
10 was invited to become a professor at City University-
11 Brooklyn College, University of New York.

12 And I remained there as a professor of
13 radio and television for -- up until such time as,
14 under congressional mandate, I was required to retire
15 and became Professor Emeritus.

16 In my duties as president of NET, I was
17 one of the founding board members of PBS. Slightly
18 earlier than that, I was a founding board member of
19 the Children's Television Workshop, Sesame Street.

20 I continued to teach, continued to be
21 active internationally primarily in public television
22 activities.

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1 Q Have you written a book on the subject of
2 public television?

3 A Yes, I've written a book published by the
4 University of California Press about two years ago, a
5 book entitled The Vanishing Vision, which was a
6 history of public television in the United States.

7 Q All right. And how long did it take you
8 to write the book approximately?

9 A About 15 years. I wrote rather slowly.

10 Q And is the -- approximately how many
11 copies did the book sell?

12 A Well, I'm only told once every year, and
13 the last report I had was something over 2,000 copies
14 have been sold.

15 Q And is it still in print?

16 A It's still in print, yes.

17 Q You've testified that you are still
18 teaching. What are you still teaching?

19 A Well, I was teaching as recently as last
20 evening, a graduate seminar in global television for
21 the City University.

22 Q Do you continue to study public television

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1 and public broadcasting?

2 A Yes, I think I do. I read Current every
3 week. And needless to say, I'm reading constantly
4 about public television. I'm not active -- actively
5 involved in public television at this time.

6 Q And I take it you communicate considerably
7 still with people in public television and public
8 radio?

9 A Yes, if only socially. Most of my friends
10 are connected with public television in one way or
11 another.

12 Q I think you'd probably be best talking to
13 the Arbitrators, not to me.

14 A Oh.

15 Q Would you -- were you asked to do anything
16 for White & Case and ASCAP in this proceeding?

17 A Yes, White & Case approached me to provide
18 a historical background of public broadcasting and a
19 study of how it operates, what its interrelationships
20 are. It's a rather byzantine structure.

21 I have discovered in teaching that you
22 can't explain public television, how it operates,

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1 unless you go at it historically, and that was what I
2 was asked to do.

3 Q Would you tell us -- and I take it the
4 fruits of that are in the direct testimony which you
5 signed and which is before the Arbitrators and which
6 was signed on September 29, 1997?

7 A Yes, that's right.

8 Q Would you tell us, just starting from 1997
9 though as kind of an introduction, what were the
10 components, in your opinion, of public television?

11 A Well, in my opinion, there are four major
12 components of public television. One of these, of
13 course, is the Corporation for Public Broadcasting
14 which is a nongovernmental entity created by Congress
15 in 1967.

16 It's designated as a so-called leadership
17 organization. Its board is appointed by the President
18 with the approval of the Senate. Its primary
19 function, I would say, is to receive congressional
20 funds and to disperse those funds at the public
21 television system.

22 Q And what would be the other three

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1 components?

2 A The second would be the Association of
3 American Public Television Stations, which was a -- is
4 essentially a lobbying function or at least to care
5 for the interests of public television in Washington.
6 It was formerly a responsibility of PBS that was
7 removed from PBS into a separate organization in order
8 for PBS to concentrate entirely upon programming.

9 The third organization, of course, would
10 be PBS, the Public Broadcasting Service. It very
11 specifically calls itself a service rather than a
12 system to underscore the fact that it is not a
13 network, and that it was to serve its member stations.

14 It is a membership association. Some 173
15 licensee entities make up the membership of PBS.
16 PBS's primary function is to select and distribute
17 programs to the member stations.

18 It's one of the curious facts about PBS,
19 however, that when it was created -- and I was in on
20 the creation of it -- the stations felt very strongly
21 that PBS should have no function to create
22 programming.

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1 Their fear was that any organization in
2 Washington or New York or Boston that had the full
3 responsibility for creating programs would centralize
4 that programming function, and they didn't want that
5 programming function centralized.

6 So it was only after some years of
7 experience when the programming schedule was not as
8 exciting as it might have been that the stations did
9 relinquish that rule and allow PBS to do some -- to
10 command some program production.

11 Q And you've testified already that the --
12 PBS is really owned by, controlled by what constitutes
13 and association of member -- local member stations.
14 Are they mandated to take the programs that are
15 promulgated by PBS or how does that work?

16 Must they take --

17 A No, as a -- PBS, as a service, provides a
18 certain number of hours of programming each week which
19 the stations are free to use or not use.

20 If they do use the programs, they are free
21 to run them now or later at any particular hour,
22 although there is a certain number of programs,

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1 specific programs, which they are urged to run on the
2 same day but are not required to do so.

3 As a membership organization, they are
4 free to treat these programs as they wish.

5 Q Now does PBS charge the stations for the
6 shows or how is PBS funded?

7 A It's a membership organization so that --
8 and the basic -- the so-called National Program
9 Service, which are the main programs that they supply
10 to the stations, the stations pay an annual -- pay
11 annual dues to PBS as members of PBS.

12 And this is that part of -- is a part of
13 the income of PBS.

14 Q So that they don't charge -- do they
15 charge for the shows as well or are those part of --

16 A No, no; they do not charge. The basic
17 service, no, they do not charge for it. There are
18 additional services for which they do charge.

19 Q And is the price that the -- or the fee,
20 or the membership charge that the stations pay a flat
21 fee, or is it some sort of percentage?

22 A No, it's something which has been argued

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1 for years, and it is based upon -- it's proportionate
2 to the size of the station, the size of the market and
3 so forth.

4 Q So we'd say it's not --

5 A I don't know the details of it.

6 Q It's some sort of formula keyed to
7 presumably revenue or market share or that kind of
8 thing?

9 A Yes, that's right.

10 Q All right. And --

11 MR. RICH: I move to strike that
12 testimony. He said he doesn't know the formula, and
13 there's a leading question to which he said, "That's
14 right."

15 JUDGE DREYFUS: Yes, we caught the
16 leading.

17 CHAIRPERSON GRIFFITH: Wait just a minute.

18 Do you know that or --

19 THE WITNESS: I'm sorry, know --

20 CHAIRPERSON GRIFFITH: What you just
21 testified to with respect to -- I've lost my place
22 now. Excuse me.

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1 You testified that you did not know at
2 this point the set up of how they paid for certain
3 things. And then --

4 THE WITNESS: I said that the membership
5 dues that they pay --

6 CHAIRPERSON GRIFFITH: Right.

7 THE WITNESS: -- is based upon a number of
8 factors, and therefore it varies from station to
9 station.

10 CHAIRPERSON GRIFFITH: Yes.

11 THE WITNESS: There are additional
12 services beyond the National Program Service, and I am
13 not precisely certain how that is paid for.

14 MR. RICH: And my objection, sir, was to
15 Mr. Schaeffer's then attempt to characterize these as
16 involving revenues and other factors.

17 MR. SCHAEFFER: Well, let me ask you --

18 CHAIRPERSON GRIFFITH: The objection is
19 sustained.

20 MR. SCHAEFFER: Let me ask the question.

21 BY MR. SCHAEFFER:

22 Q Do you have an understanding as to the

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1 components of the basic membership charge of PBS?

2 A Yes, I do.

3 Q What is your understanding?

4 A My understanding is it's based upon the
5 budget of the station, upon the size of the market.

6 Q Moving on, what is the fourth component of
7 Public --

8 A Well, the fourth, and obviously the major
9 component of the Public Broadcasting System, are the
10 stations themselves, which there are something like
11 350. But a number of the entities and members of PBS
12 operate multiple stations so that there are 173
13 licensee organizations that are members of PBS.

14 When educational television was created,
15 the FCC did no more than set aside a certain number of
16 frequencies which were to -- which could be licensed
17 by eligible organizations in those communities in
18 which the channels were set aside.

19 The FCC made no provision, nor did
20 Congress make any provision, for funding these
21 channels. And the result is, it was left entirely to
22 local community action. The first station to go on

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1 the air was KUHT in Houston, which was largely -- the
2 University of Houston -- largely financed with oil
3 money.

4 The second station to go on the air was
5 KTHE in Los Angeles, which was largely financed by the
6 -- by Captain Allan Hancock of Hancock Oil. It later
7 went off the air when Captain Hancock left USC, which
8 was the licensee organization.

9 So each community took its own action to
10 put its station on the air. They came on the air
11 very, very slowly for that reason because there was no
12 provision for financing these.

13 The earliest stations -- aside from the
14 two I have mentioned, the earliest stations were
15 college stations because the college had a budget
16 available to put the station on the air. Michigan
17 State was one of the early ones. University of
18 Wisconsin was one of the earlier ones.

19 So each of these stations grew up
20 differently depending upon local circumstances. And
21 the result is that you have in PBS stations a mixture
22 of some 26 stations or licensee authorities that are

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1 licensed to state authorities.

2 This is the case in -- I guess the most
3 famous is South Carolina, but it's also the case in
4 New Jersey and Kentucky where there are state
5 authorities created to operate a state network.

6 Then there are 62 of the stations that are
7 licensed to colleges and universities. I mentioned
8 the Michigan State, University of Nebraska and others
9 licensed to colleges and universities.

10 And then there are eight educational or
11 municipal authorities including, for example, Dade
12 County. The Government of Samoa operates an
13 educational station.

14 In San Francisco, when we set about
15 putting KQED on the air, it was a question of which
16 educational authority would be the licensee
17 organization. Would it be the Alameda County Schools,
18 the San Francisco County Schools, the San Mateo County
19 Schools, Stanford, Berkeley, San Mateo College and so
20 forth?

21 So we were the first to create a so-called
22 community corporation. We said that we will create

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1 our own nonprofit corporation and operate on behalf of
2 all of the educational institutions of the San
3 Francisco Bay Area.

4 That became then the pattern for some 90
5 community stations -- so-called community stations
6 because they're operated by nonprofit organizations
7 that are not directly connected with other
8 institutions.

9 The community stations which exist in most
10 of the large cities -- Chicago, New York, Washington,
11 D.C., San Francisco, New York, Boston -- are the most
12 influential if only because of their size, their
13 market, their audience, as well as their budgets.

14 And two of them, WNET in New York and WGBH
15 in Boston, are by far the major producers of programs
16 for the PBS system and are obviously more than
17 ordinarily influential for that reason as well.

18 Q Well, would you comment on what other
19 community stations produce programs for their brethren
20 and the approximate size of the -- would you comment
21 about what other community stations, other than New
22 York and Boston, produce programs for PBS stations?

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1 A Well, other than New York and Boston, the
2 primary producing stations are Chicago and Los
3 Angeles, of course, and San Francisco. To a lesser
4 extent, Pittsburgh. Those are the main producing
5 stations.

6 Q I'm going to show -- this is a chart
7 that's already in the book or in his direct testimony
8 at page seven, but I thought it would be a little
9 easier to read if we cut it away. So there are two
10 charts, both from the book -- the booklet, I'm sorry.

11 This is a -- what I put in front of you is
12 a duplicate or, I think, a slight enlargement --
13 which, for my eyes, makes it easier to read -- of page
14 seven of your direct testimony.

15 Did you prepare this chart?

16 A I did.

17 Q Would you tell us -- take us through what
18 it's supposed to represent.

19 A Well, it was supposed to represent a
20 graphic organization of PBS, Public Broadcasting, to
21 help me understand it. Because even though I've been
22 in it for all these years, I too get very confused as

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1 to the relationship among these organizations.

2 It is, more often than not, described as
3 a byzantine organization, and I think this is evidence
4 of that.

5 We begin with the Federal money in the
6 upper left-hand corner with Congress.

7 Q I'm just going to interrupt you for one
8 second. I notice this says 1995 Financial Figures.
9 Why did you use 1995?

10 A At the time that I prepared this, these
11 were the most recent figures that I had access to.
12 They come largely from the Corporation for Public
13 Broadcasting annual report, and the 1996 report was
14 not out at this point, or at least I didn't have it.

15 The figures may be significant in terms of
16 their proportions, but not, I think, in terms of the
17 exact amounts.

18 Q Thank you.

19 A So the Federal money comes from Congress
20 to the Corporation for Public Broadcasting. And part
21 of that money -- I don't know precisely the figure; I
22 don't have it here -- goes to public radio. And then

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1 there is an allocation to public television stations.

2 And I've noted that as a community service
3 grant. As you see, half of the money appropriated by
4 Congress goes directly to the PBS stations. This is
5 a result of a lobbying effort on behalf of the
6 stations, and other factors were involved, I'm sure.

7 So that each station is -- gets a
8 community service grant. Again, I do not know --
9 although it is proportionate with the size of the
10 station. I do not know the formula by which that
11 decision is made.

12 So that's \$143 million, in this case,
13 going to the stations. Now the stations may use this
14 money in any way they see fit. It need not go into
15 programming. It can go into overhead, and usually
16 does go into the overhead operations of the stations.

17 But they also may use it to pay their PBS
18 dues. The stations have been historically the
19 creators of most of the programming. And as I have
20 indicated earlier, that tends to centralize somewhat
21 in the major producing stations.

22 And the cost of the programming -- well,

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1 the support of the stations then comes from other
2 sources indicated on the margins of the stations box.
3 It comes from voluntary viewer support, and that could
4 be either in the form of a subscription, or a
5 membership, or auctions which are held in some
6 stations annually.

7 But it is voluntary viewer support, and
8 that represents obviously a major source of support
9 for the stations. Business and corporations give
10 money to support stations, but they also give money to
11 support programs.

12 And I've indicated down below that some of
13 the programs on PBS come from independent producers
14 who are not a part of the stations, and they also seek
15 money -- funds from the same sources, namely business,
16 corporations.

17 And on the right-hand side, from
18 foundations as well. Foundations also support the
19 stations. And of course, some stations, as I've
20 indicated, are supported very heavily by colleges and
21 universities if they are -- if they are the licensee,
22 or by state and local governments if they are part of

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1 the state set up.

2 Although, state and local governments also
3 contribute, as they do in the State of New York. The
4 State of New York contributes to all of the stations
5 in the State of New York, including the community
6 stations.

7 Now the programs tend to flow from the
8 stations to PBS. And with that also flows the
9 membership money, the dues that PBS charges its member
10 stations. And the funding of the National Program
11 Service then comes from two sources -- partly from the
12 dues paid by the stations and partly from \$22½ million
13 dollars that comes from the CPB program fund.

14 Now this is very confusing, but
15 historically there are reasons why these sorts of
16 things happen. There was a period in CPB's history --
17 initially CPB had nothing to do with programming.

18 There was a period in its history when it
19 took on the programming; in fact, attempted to take
20 the programming away from PBS. And so program money
21 then began to be held within CPB.

22 One of the presidents of CPB, in order to

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1 divorce the program money from the administrative
2 functions of CPB which they felt had some political
3 control, set up something called the Program Fund with
4 a budget of about, what, \$45 million dollars.

5 And they -- CPB would create programs
6 while PBS was funding programs also at the same time.
7 It was almost competitive. And then, more recently --
8 I've forgotten the precise year, but in recent years,
9 PBS and -- Congress forced PBS and CPB to come to
10 terms about how this money should be handled.

11 And the result was that CPB agreed to give
12 half of its \$45 million dollars to PBS for the
13 creation of programming. And that's the reason you've
14 got the \$22.5 going into the National Program Service
15 at PBS.

16 Now I don't know if that explains because
17 I'm not even too certain I understand all of this.

18 Q Would you comment next on -- fortunately,
19 you were one of the folks that was around then. In
20 your view, have there been changes in PBS programming
21 over the last 20 years? That's since 1978 up until
22 1997 or '98. And if so, what have they been?

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1 A Well, this is probably an aesthetic
2 judgement in that I think that there has been far too
3 little change in the programming itself. Some of the
4 programs that were created in the earliest days of PBS
5 are still part of the program schedule, Masterpiece
6 Theater being a good example.

7 Washington Week in Review, one of my
8 favorite programs incidentally, but it's still been on
9 for I don't know how many years now. It goes back to
10 the earliest days of PBS. In fact, and this one even
11 precedes PBS.

12 Wall Street Week -- the major programs on
13 the PBS schedule are relatively unchanged over the
14 last 20 years, I would say.

15 Q In your -- at page eight in your second
16 paragraph, you said there have been replacements in
17 prime time by certain other kinds of programs. Would
18 you comment on that?

19 A Well, yes; there was a time when there
20 were programs in the PBS schedule that were a bit more
21 daring than those that are now on, a bit more
22 controversial. There was a dramatic series called

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1 Visions. There was a highly created series called --
2 lost the title of it, but it was a theater series that
3 used original plays.

4 And much of that has disappeared for the
5 simple reason that most of the programming on prime
6 time on the National Program Service is underwritten,
7 and underwriters tend to seek a positive image and
8 don't want to associate their corporate name with
9 something which is controversial or something which
10 will upset people.

11 It's a practical thing for PBS to have
12 done, and one can understand why it might be done.
13 But except for a program like Frontline, which is --
14 does do controversial programs and doesn't have any
15 corporate underwriting, there are very few programs on
16 the National Program Service that really provoke the
17 mind.

18 They're heavily cultural.

19 Q Okay, --

20 A There was a time when there were a number
21 of programs like French Chef, what we call "how to do
22 it" programs, that were in prime time. But more and

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1 more, those tend to fill up the daytime hours on
2 public television today mostly with corporate
3 underwriting, incidentally.

4 That is programs in cooking -- a lot of
5 cooking programs. A lot of cooking programs on public
6 TV.

7 (Laughter.)

8 Q Could you give us some examples of the
9 prime time shows or programs that are referring to as
10 having replaced the more controversial ones?

11 A Well, I would say programs like Nature
12 certainly would be one. The American Experience,
13 American Masters -- good programs, but not exactly
14 controversial programs.

15 Q And you attribute that, I take it, somehow
16 to the underwriting program?

17 A Oh, yes.

18 There's something else that an underwriter
19 -- if you go to a corporation and ask them to put up
20 money for a program, the corporation, I think quite
21 rightly, wants to have some guarantee that this
22 program will not upset the audience.

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1 And for that reason, imported programs
2 have been relatively popular. Again, Masterpiece
3 Theater is the oldest and the best example of it, but
4 recently we've had Sister Wendy and the Full Circle
5 with Michael Palin.

6 These are programs you can look at
7 beforehand. So you say hey, those are all right, you
8 know, and we can go ahead and use those. So that
9 there have been a number of those.

10 There are other reasons too, of course.
11 Imported programs generally are co-productions which
12 means the money is mixed, the American with the
13 British money. And that way, programs that otherwise
14 might be unaffordable are made possible by co-
15 production arrangements.

16 Q To what extent do you believe that has
17 been caused by political events or events involving
18 the Federal Government? That is, the move toward the
19 kinds of programming that appeals to underwriters as
20 you've already described.

21 A I'm not sure I understand.

22 Q Why don't we skip that. You've got it in

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1 your report anyway.

2 Would you comment on the concept of
3 enhanced underwriting and what that is?

4 A Well, --

5 Q And the history.

6 A Yes, during the administration of
7 President Reagan, there was a strong move to privatize
8 public television or, in President Reagan's phrase,
9 "to get public television off the Government's back."
10 I'm not precisely sure what they meant by privatizing
11 public television.

12 To me, it's an oxymoron. But President
13 Reagan did take one definite step by rescinding \$35
14 million dollars of money that Congress had already
15 appropriated. The pressures were then put upon public
16 television to look at other possible sources of
17 income.

18 And one of the steps that was taken was
19 the creation of the Temporary Commission on Alternate
20 Funding. This was created, I believe, by the FCC.
21 And the Temporary Commission on Alternate Funding
22 undertook an experiment with ten public television

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1 stations of varying sizes, incidentally, for 18 months
2 in 1982 and '83.

3 These ten stations were permitted to run
4 commercials. About seven of them actually ran what we
5 know was commercials -- 30 to 60 second commercials.
6 Another three ran what they called "enhanced
7 underwriting."

8 Again, I'm not sure I can make a
9 distinction between the two because the enhanced
10 underwriting I have seen looks precisely to me like
11 what I would think of as a commercial.

12 At any rate, the idea was to determine (a)
13 whether advertising as such would be a viable source
14 of income for public television stations, and (b)
15 whether it would cause a negative reaction with the
16 audience if commercials were run.

17 When the TCAF, the Temporary Commission,
18 issued its report, it concluded that advertising would
19 not be a sufficient source of income to support public
20 television, but also discovered that the audiences
21 apparently did not react negatively to the commercials
22 on these ten stations.

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1 And in the conclusion, why they decided
2 that since it was not an adequate source of income for
3 the stations and since, at the same time, by accepting
4 advertising, the stations might lose what concessions
5 they were getting from the unions, for example, as
6 noncommercial, and also might alienate those people
7 who were now giving money voluntarily and who might
8 very well not give that kind of money, so they did
9 recommend against commercials in the long run.

10 But the result was that they did relax the
11 rule that had been set up for what was acceptable in
12 underwriting, underwriting being -- it may be useful
13 to make the point that when underwriting first began
14 on public television, and it goes back to the --
15 probably to the 60's, NET wanted to credit a corporate
16 underwriter.

17 And they did so under the FCC regulation
18 which -- disclosure rule which said that if you get
19 money for a television program, you have to reveal the
20 source of that money. The obvious purpose of this, to
21 me, was for politics, for political programming.

22 But it was used to public television's

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1 benefit to say okay, if we get money from a
2 corporation, we have to reveal that. But in the early
3 days, the rules were such that all we could say was
4 "this program made possible by" and then give the
5 corporate name.

6 We could not say 3M. We could not say
7 IBM. We had to say International Business Machines or
8 we had to say Minnesota Mining and Manufacturing. We
9 had to use the exact corporate name. Even then, one
10 of our major stations refused to run programs that
11 were underwritten by the Ford Foundation because they
12 claimed it promoted the sale of Ford automobiles.

13 But the attitude in those years was so
14 against promoting corporations on the air. Now, over
15 a period of years, this gradually gets relaxed until
16 Mobil on Masterpiece Theater wanted to use its red O
17 and for -- or even wanted to use its own logo type and
18 couldn't.

19 And then finally, of course, they were
20 permitted their own logo type and the red O. And now
21 they're permitted to call it the Mobil Masterpiece
22 Theater, which is no different than Texaco Star

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1 Theater or GE Theater or whatever. It ran on
2 commercial television in the early days.

3 I've lost track of where I was going now.

4 (Laughter.)

5 Q I was asking you about the history of
6 enhanced underwriting.

7 A Yes.

8 Q And you had taken us up to the --

9 A Yes, and now --

10 Q I asked you what it is and --

11 A Now public television is permitted to not
12 only use the corporate name, but to actually display
13 the corporate product. They are not allowed to make
14 comparative claims with competing products. And there
15 are these kinds of restrictions.

16 But generally, they are permitted to give
17 an underwriting credit that, in most cases, is almost
18 indistinguishable from the commercial for the same
19 product on commercial TV.

20 Q And in your opinion, has that had an
21 effect on underwriting income?

22 A Yes, the underwriting income obviously has

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1 gone up because we used to joke about -- in the days
2 when our only underwriters were the petroleum
3 companies. In fact, journalists were calling it the
4 Petroleum Broadcasting System.

5 And the reason was quite simple that, out
6 of the crisis -- I've forgotten what year it was when
7 we all lined up at gas stations and couldn't buy gas,
8 and these stories were being written that all this oil
9 was in the New York Harbor in ships and they were
10 holding out for a higher price, the oil companies,
11 obviously looking for a good image, came to public
12 broadcasting.

13 We were very grateful for that. And those
14 are the years we used to say let's see, let's find a
15 polluter. We've got this wonderful show; let's find
16 a polluter we can get this show on the air.

17 I mean, that's true. We did that.

18 Q I want to move on. Let me move on and
19 skip over because there is much in here, but I don't
20 really want to take that much time.

21 Has there been a change since 1978 in the
22 sources of funding? And if so, could you tell us what

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1 they have been? These are sources of funding of
2 public broadcasting in general. I'm not just talking
3 about PBS.

4 A Well, the changes in the source of funding
5 simply that the funding from audience -- the voluntary
6 memberships and subscriptions from the audience, and
7 the funding from corporate sources, has increased.
8 Whereas, the proportionate amount from the Federal
9 Government has decreased.

10 In the short, I have included showing the
11 changes in public television come from 1980 to 1995.
12 Whereas, in 1980, the Federal Government, as a source,
13 represented 26% of the total income of public
14 television, it, in 1995, represented 14.5%.

15 And the state and local governments 30% in
16 1980. It fell to 23% in 1995. College and
17 universities remain pretty much the same, as have --
18 well, foundations have gone up slightly.

19 But the audience support in 1980 was 16%.
20 In 1995, it was 22%. And the business and corporation
21 income represented 11% in 1980 and 15% in 1995. So if
22 you combine the audience support along with business

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1 and corporation support, which is to say
2 nongovernmental support, why it shows us a definite
3 trend in the direction of support other than public
4 support -- other than Government support.

5 Q Why did you use 1980 and 1995 in this
6 report -- in this little chart?

7 A I couldn't find the figures from 1978 or
8 I might have used that. I would have used that.

9 Q And I notice there's a trebling in the
10 total amount of money also?

11 A Yes, the total amount obviously has gone
12 up quite considerably between 1980 and 1995 from \$581
13 to a million -- \$1,564,000,000.

14 Q All right. Moving on, did you undertake
15 to discuss certain local television stations -- local
16 public television stations and what happened to them
17 over the last ten -- 20 years?

18 A Yes, I did. It's not generally understood
19 that the real center -- the real center of gravity of
20 public television is not PBS or CPB; it's in these
21 stations. Not only do they control PBS, but each
22 independently serving its own community operates

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1 somewhat by its own rules.

2 I chose three stations to look at, KQED in
3 San Francisco and WTTW in Chicago and WNET in New
4 York. Now, obviously I've had association with two of
5 those three stations.

6 I chose the stations WTTW in Chicago
7 because the president of WTTW is -- who is,
8 incidentally, a very good friend -- is also one of the
9 strongest proponents of commercializing public
10 broadcasting and has, in the past, argued that he
11 feels that public broadcasting stations ought to be
12 permitted to broadcast commercials and figures that --
13 and feels that that will not alter the mission of his
14 station.

15 He's one of the most respected men in our
16 business. So that was the reason for choosing the
17 three stations.

18 In each case, again, the local stations
19 seemed to represent what I've just indicated on the
20 total income of public television for those years that
21 the funding sources are -- have shifted in the last 20
22 years from governmental sources, or at least the

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1 proportions have moved in the direction of the
2 corporate support and support from the audience, and
3 particularly support from the audience.

4 Q Would you discuss the history of KQED in
5 San Francisco?

6 A I'd be happy to.

7 When we went on the air, we probably had
8 about \$40,000 in the bank. We went on the air in
9 1954. Actually, we were on the air two days -- two
10 nights a week. We were using borrowed equipment in a
11 trade school. We could only go on the air when the
12 trade school wasn't using the equipment, which meant
13 two nights a week.

14 And after the first year on the air, we
15 went broke. But fortunately, we went spectacularly
16 broke, and therefore gained a great deal of attention
17 by the activity. The board of directors had told me
18 to close down the station and wait for a more
19 auspicious time to reopen.

20 And I argued that it wasn't their
21 decision, the station belonged to the public. We
22 ought to go to the public and see if they wanted to

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1 close down. So we went to the public in a 30 day
2 effort.

3 We invented something called a television
4 auction. I regret that, but we did. And it did save
5 our skins. We raised the amount of money and
6 continued to go on the air.

7 When I was hired, the board of directors
8 told me that we were going to support the station by
9 memberships from the audience. I didn't make that
10 decision myself. My colleagues in other stations
11 around the country thought we were totally out of our
12 minds to attempt to support a station by membership.

13 But we got the idea from a radio station
14 in Berkeley, KPFA, which had supported itself, and
15 still does, by audience memberships. And so we
16 created what is now the major source of income for
17 public broadcasting, namely voluntary -- I make a
18 distinction between subscriptions and memberships.

19 KQED has memberships, which means each
20 person who contributes that becomes a member has a
21 vote for the board of directors. So it's very
22 democratic. Most stations solicit subscriptions,

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1 which simply means you help pay the cost of the
2 programming.

3 And so, in subsequent years then, for many
4 years, an annual auction, which tended to run for
5 about 15 days, and solicitations from the audience
6 became a primary source of revenue for the operation
7 of the station.

8 Q Would you comment on the -- as you
9 understand it, the present popularity or degree of --
10 and degree of market penetration of KQED in San
11 Francisco?

12 JUDGE DREYFUS: Excuse me one minute.
13 Sorry to interrupt.

14 THE WITNESS: Sure.

15 JUDGE DREYFUS: Can we go back to your
16 last answer? Could you give us some detail on the
17 auction itself? Where did you get the material to
18 auction and how did it work?

19 THE WITNESS: Sure.

20 JUDGE DREYFUS: Just briefly.

21 THE WITNESS: The idea was created by some
22 public relations men that I hired. It had been tried

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1 on radio. We had our women volunteers -- about to say
2 go out and solicit, but that sounds -- doesn't sound
3 quite right.

4 They did go to firms that would be happy
5 to give us merchandise to sell for obviously a mere
6 mention of that -- well, actually, what happened is
7 that we fell very quickly into the pattern of going on
8 the air and acting precisely as you've seen commercial
9 pitch men/women on commercial TV do.

10 We sold the items. The first year the
11 auction only ran one day. The second, it ran three
12 days. And by the third, we were up to a week. But by
13 then, it became such an attractive thing for people to
14 give -- for corporations to give merchandise that we
15 had no difficulty.

16 We've sold houses, we've sold automobiles,
17 we've sold safaris to Africa, we've sold all kinds of
18 things in these years. But it was all donated
19 merchandise, and it was a game. The value of the
20 auction in the early days was less the money that it
21 brought in and more the involvement of the community
22 in the station.

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1 It probably helped make KQED -- and as a
2 matter of fact, KQED claims the largest per capita
3 audience of any of the public television stations.
4 And I swear that part of it is just its relationship
5 with the community almost more than its programming.

6 Q Do you have -- at the present time, can
7 you approximate what you understand to be the
8 percentage of Bay Area households -- that is, San
9 Francisco Bay Area households that KQED is watched by?

10 A No, I don't have -- if that's in my
11 testimony, I have forgotten what it is.

12 Q Well, why don't you look at page 17. It
13 may refresh your recollection to some extent.

14 A I said that KQED members make up almost
15 ten percent of Bay Area households. It has the
16 highest market penetration among the top ten public
17 television stations.

18 Q And would you comment also on KQED's
19 history as a producer of programming for public
20 broadcasting?

21 A Well, in the earlier days, it was one of
22 the two or three major producers of programs for the

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1 Public Television System. In subsequent years, it
2 fell somewhat in importance in relation to --
3 particularly in New York and Boston.

4 In those earlier years, it was almost a
5 question of whether it was economically useful to
6 produce programs for the National Service. And you
7 tend to build up your staff, and then you have to find
8 money to support the staff.

9 In more recent years -- and I've not had
10 that close contact with KQED, but I know that their
11 major productions now are cooking shows. They do
12 Jacques Pépin and Yan Can Cook. And so they have
13 found it very useful.

14 Now what I have learned from them is that
15 it's so costly to have a studio crew in their studios
16 all day long to do what we think of as community
17 programming that, by getting underwriting, corporate
18 underwriting for these cooking shows, it pays the cost
19 of bringing a crew in to do those and the crew is
20 there for whatever the work day is, eight hours, and
21 they can do other shows.

22 Now, more recently, KQED has succeeded in

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1 persuading the MacNeil Lehrer Production Company to
2 put their west coast base at KQED mostly because one
3 of the correspondents, Elizabeth Farnsworth, wants to
4 come back home to San Francisco.

5 Now MacNeil Lehrer Productions pays the
6 cost of the crew to come in to do whatever needs --
7 and they can do local programming while the crew is
8 there. At least that's the argument of the current
9 president of KQED.

10 Q At page 17, you have a chart of KQED
11 funding sources and expenses. What was the source for
12 that?

13 A That came from the KQED annual report.

14 Q And where did you get the KQED annual
15 report?

16 A From KQED.

17 Q And would you also comment on the evening
18 program schedules at KQED as they existed in 1978 and
19 as they existed in 1997?

20 MR. RICH: May I interrupt here?

21 We were advised by White & Case that the
22 reference in this paragraph on page 18 to program

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1 schedules, Exhibit F, does not exist. We were never
2 supplied with it. We were told the witness never had
3 a chance to compile it.

4 MR. SCHAEFFER: Oh, I'm sorry. I did not
5 know that and I -- let's just withdraw the question
6 then.

7 MR. RICH: I would also move to strike
8 that entire testimony -- written testimony at the top
9 of page 18 that purports to relate to an exhibit which
10 --

11 MR. SCHAEFFER: I will withdraw it. You
12 don't have to strike it.

13 CHAIRPERSON GRIFFITH: All right, the
14 question is withdrawn and the testimony of the first
15 paragraph on page 18 is withdrawn.

16 Is that correct?

17 MR. SCHAEFFER: Yes, I may put it on in
18 rebuttal.

19 CHAIRPERSON GRIFFITH: All right.

20 BY MR. SCHAEFFER:

21 Q And would you -- are you familiar with the
22 practice of enhanced underwriting at KQED; and if so,

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1 what is it?

2 A No, I don't think I am sufficiently
3 acquainted with it. I do know, but my information
4 comes from my friends in San Francisco with whom I'm
5 in constant contact, --

6 Q That's all right.

7 A -- that the station looks now very
8 commercial. That's all they tell me; that there are
9 -- and so I can't give a specific answer.

10 Q Can you give me -- do you have any -- can
11 you make a comparison of WTTW in Chicago between as it
12 was in '78 and as it is in 1997 and tell us the
13 history of that?

14 A Well, the -- in terms of its income, the
15 1996 revenues on page 19 indicate that the station has
16 gone very heavily into the production contract
17 business of using its studios to produce programs, in
18 some cases, for commercial purposes as a means of
19 taking care of its -- of the overhead in the studio.

20 So that the income from WTTW, as I
21 indicated here, 40% from member/subscribers, 30% from
22 production contracts and 15% from corporate

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1 underwriting, so that the proportion of income is very
2 heavily skewed toward members and toward production
3 contracts and --

4 Q I notice the description in the little box
5 on page 19 is Window to the World Communications, Inc.
6 That's what WTTW stands for, I assume?

7 A Yes, Windows to the World is what WTTW
8 stands for.

9 Q Would you address your attention to WNET
10 and how that has developed since 1978?

11 A WNET, the educational -- the licensee is
12 the Educational Broadcasting Corporation, and this is
13 a revenue summary from 1995 through 1996. They listed
14 community service grant at \$4 million dollars. They
15 are the largest of the recipients of community service
16 grants, incidentally.

17 Program grants, \$2.7 million. And PBS
18 National Program Service grants at \$11.7 million. The
19 underwriting here shows that \$20 million -- \$20.9
20 million roughly of underwriting comes from
21 corporations.

22 Foundations and Government agencies, \$6.8

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1 million. And presales, \$719,000. Membership income
2 at \$21.6 million. So that again, the income generally
3 is heavily skewed toward memberships and toward
4 corporate support.

5 Q I am going to try and wind this up so you
6 can be -- the cross you won't hopefully -- or at least
7 going on a while.

8 What is your general observation on how
9 the public broadcasting -- television public
10 broadcasting stations have changed since 1978 up until
11 1997? Why don't you give your general view.

12 A Well, quite clearly, from my point of
13 view, they have had to rely much more heavily upon
14 corporate support in their programming. And it's been
15 a matter of necessity because there's been no other
16 sources of support to underwrite the cost of the
17 expensive programs.

18 And PBS has, in its annual report,
19 indicated that it has become entrepreneurial out of
20 necessity, which means that it must not only find
21 corporate underwriting support, but it must also make
22 arrangements with commercial companies.

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1 I just saw a press release recently that
2 they have now formed a PBS Record Company. They've
3 had to be entrepreneurial in order to survive. But it
4 has moved it away from the original conception of
5 noncommercial television in the early days to
6 something which is a hybrid between noncommercial and
7 commercial television.

8 MR. SCHAEFFER: I have no further
9 questions for this witness at this time.

10 MR. RICH: Your Honors, in light of the
11 fact that I will not finish my cross before -- we've
12 been going since 9:30, might it make sense to adjourn
13 now for an hour and pick up with my complete cross
14 thereafter?

15 CHAIRPERSON GRIFFITH: It might, Mr. Rich.

16 MR. SCHAEFFER: I have one -- could you
17 give us an estimate of how long you're going to be?

18 MR. RICH: Under an hour.

19 CHAIRPERSON GRIFFITH: Why don't we come
20 back at 1:45. We'll adjourn for lunch until 1:45.

21 (Whereupon, the proceedings recessed for
22 lunch at 12:43 p.m.)

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A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

(1:52 p.m.)

CHAIRPERSON GRIFFITH: All right, Mr.

Rich?

MR. RICH: Thank you.

BY MR. RICH:

Q Good afternoon, Mr. Day.

A Good afternoon.

CHAIRPERSON GRIFFITH: I'm going to get my
pad. I'm sorry.

JUDGE DREYFUS: That's the shortest cross
I've ever seen.

CHAIRPERSON GRIFFITH: Oh, it's over?

MR. SCHAEFFER: Wishing doesn't make go
away.

BY MR. RICH:

Q Mr. Day, I take it that the last position
you held in public broadcasting dates back to 1973
when your tenure at WNET ended, is that correct?

A That's right.

Q Since that time you've not been employed
by any public broadcasting entity, is that correct?

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1 A That's correct.

2 Q And when was the last time you served on
3 the board of a public broadcasting related
4 organization?

5 A I would say probably about eight years
6 ago. I haven't got the exact date in front of me.

7 Q What was that involvement at that time?

8 A Children's Television Workshop. I was on
9 that board for about 14 years from 1969.

10 Q So since that time you've been observing
11 as an interested outsider and I take it a journalist
12 in your capacity writing your book, yes?

13 A That's right.

14 Q Now speaking of your book that was
15 published when, about 1995?

16 A 1997.

17 Q 1997.

18 A Yes.

19 Q I beg your pardon. And that book
20 advocates the need for a vital public television
21 system in the United States, is that correct?

22 A That's right.

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1 Q One that accomplishes goals which
2 commercial television has not accomplished, correct?

3 A Right.

4 Q And which commercial television as we know
5 it cannot accomplish, true?

6 A True.

7 Q Am I right, that the jacket copy of your
8 book -- strike that.

9 I take it the jacket copy of your book
10 describes a public television system which you
11 envision as "capable of counterbalancing the common
12 denominator of programming of private television and
13 cable with a range of substantive programs, comedy as
14 well as culture, entertainment as well as
15 information." Is that at least a partial aspect of
16 your vision for public television?

17 A Yes, in the sense that as the British put
18 it, comprehensive programming, rather than educational
19 programming. I think that for public broadcasting to
20 attract the audience I believe it deserves, its
21 programming has to be more varied than it is now.

22 And that the criterion for public

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1 broadcasting ought not to be the genre of programming,
2 but the quality of programming which is to say now we
3 might disagree --

4 Q I think, sir, you've answered my question.

5 A Okay.

6 Q Thank you. What is it about commercial
7 television that in your estimation prevents it from
8 fulfilling your vision for public television?

9 A Because every decision is an economic
10 decision.

11 Q Can you explain a little more what you
12 mean by that?

13 A That if you take the program schedule of
14 the three networks for a full week, to insert into
15 that program schedule anything which tends to lessen
16 the audience potential for that half hour, tends to
17 affect other programs that follow it and therefore
18 commercial television tends to look at the entire
19 schedule and is economically unwilling to risk risky
20 programs that might affect other programs, if you
21 understand what I mean.

22 Q I take it you would agree that commercial

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1 television is both advertiser and mass audience
2 driven, correct?

3 A Yes, of course.

4 Q And I believe you've criticized it on that
5 basis for leading to lowest common denominator type
6 programming, correct?

7 A That's right.

8 Q And in turn, your vision for public
9 television using our felicitous phrase from your book
10 is that its mission should be service not sales,
11 correct?

12 A It should be what?

13 Q Service not sales?

14 A I don't recall saying that, but I would
15 agree with that, yes.

16 Q Okay, what programming that our society
17 deserves exposure to, what television programming
18 cannot as a practical matter be sustained by
19 commercial television in your estimation?

20 A Well, programming that does not reach the
21 maximum possible audience.

22 Q Can you give me an example of some genres

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1 of programming that are not capable of reaching the
2 maximum audience?

3 A Well, you need to look at the schedules of
4 the three networks and notice what programs are
5 missing.

6 Q You can identify the types of --

7 A Documentaries. Dramatic programs that are
8 not sitcoms or action adventure shows. Those are the
9 things I think that -- I mean, I'm old enough to
10 remember when commercial television did these kinds of
11 programs, so that it's not hard for me to think of the
12 kinds of programs that are missing.

13 Q Does commercial television in your
14 estimation provide sufficient in-depth news coverage?

15 A No.

16 Q Does it in your estimation handle
17 children's programming as well as it should?

18 A No.

19 Q What are the shortcomings in respect of
20 commercial television's handling of children's
21 programming?

22 A Well, if there were no shortcomings,

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1 Congress would not have asked them to add three hours
2 of children's programming.

3 Q Is it the volume, the amount of children's
4 programming, is that your --

5 A No, it's the quality of children's
6 programming, yes.

7 Q You played a significant role in the
8 founding of Children's Television Workshop, I believe
9 you testified to, is that right?

10 A Yes.

11 Q And for all us, we're parents, it's our
12 first contribution to public television was Sesame
13 Street, is that right?

14 A That's right.

15 Q I take it you're very proud of that?

16 A Indeed. It has nothing to do with the
17 production of Sesame Street. That should be made
18 clear.

19 Q Would Sesame Street have found a home on
20 commercial television?

21 A It may yet, but no, it would not have at
22 the time it was created. I don't believe it would.

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1 I have to think in terms of 1969 and what commercial
2 television was like in 1969. I believe it had been
3 offered to commercial television and was refused by
4 them.

5 Q So it found a home ultimately on public
6 television?

7 A That's right.

8 Q Now accepting for the moment your premise
9 that noncommercial television has not achieved its
10 potential, would you nevertheless agree that it has
11 made significant contributions in terms of the quality
12 of its programming through the years?

13 A Commercial television?

14 Q Noncommercial.

15 A Noncommercial.

16 Q Yes. Would you agree it's made some
17 significant contributions in the programming area?

18 A Oh indeed.

19 Q Could you give me a few examples of what
20 you believe its more illustrious moments have been?

21 A Well, it may be self-serving, but I would
22 say certainly one of its most illustrious moments was

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1 when I was president of NET and we created the Great
2 American Dream Machine and American Family and BD
3 Blues, the sorts of things you don't find on
4 noncommercial television.

5 Q And in more recent years, are you a viewer
6 of public television?

7 A Yes.

8 Q Are there particular programs you turn to
9 on public television today because, in part, you can't
10 find similar fare on commercial television?

11 A That's a difficult question to answer
12 because I find similar fare on cable. No, I don't
13 find it on the three networks to be sure and certainly
14 one of the most exciting programs from my point of
15 view and most of you won't agree with this, that I've
16 watched on public television recently did not come
17 through PBS, it came from CBC in Toronto.

18 Q Just for the record, what was it?

19 A It's called The Newsroom. It was a satire
20 on news that was quite sharp, the kind of satire that
21 for the most part is not acceptable to American
22 audiences on television here, but is in Canada. Only

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1 one station ran it and that was a station in New York.

2 Q Would you agree with me overall, sir, that
3 the run of public television's program fare is vastly
4 different than that found typically on commercial
5 television, say look at prime time programming?

6 A That's a difficult question to answer
7 because of the word "vastly".

8 Q Let me rephrase it. Is it considerably
9 different?

10 MR. SCHAEFFER: What's the difference
11 being "considerably" and "vastly"?

12 THE WITNESS: Yes, that's very difficult.

13 BY MR. RICH:

14 Q Well, let's focus on prime time schedules.
15 You make a few statements, do you not, in your book
16 about comparatively the programming which appears on
17 prime time, typically on public television versus
18 commercial television? Is that correct?

19 A Oh yes.

20 Q Let me read you two excerpts from your
21 book and if at any point you want to see it, we can
22 provide them to you.

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1 At page 357, you say the following:
2 "Because PBS was created as an alternative to
3 mainstream television, it has been exiled into the
4 ghetto of high minded 'educational' fare with a prime
5 time schedule that appears to have risen off the pages
6 of a college course catalog."

7 A I wrote that.

8 Q Yes, you did. And at page 345, I believe
9 you wrote: "Too many of public television's prime
10 time series, those gaseous explorations of cosmic
11 abstractions in pursuit of corporate underwriters or
12 tedious illustrated lectures, rationalized as adult
13 education sound more like graduate seminars than the
14 fare that might attract us to television at the end of
15 a trying day." correct?

16 A Yes, I wrote that.

17 Q I take it by those descriptions you were
18 not suggesting that the fare that we find on Fox or
19 ABC or NBC or CBS is comparable during prime time,
20 correct?

21 A That's correct. If I may, I'd like to
22 explain why I think they're gaseous programs as I've

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1 written.

2 Q Well, I think either I'll get to it or
3 perhaps your counsel will on redirect.

4 And I take it that it's also your view
5 that, and I believe you so indicated in your response
6 to several of Mr. Schaeffer's questions that the
7 programming fare overall over 20 years on public
8 television, correct?

9 A Prime time programming, yes.

10 Q You said too little, I believe, in fact,
11 in response to Mr. Schaeffer, for your tastes, yes?

12 A Yes.

13 Q And to the extent it has moved, I take it
14 from your testimony at page 21, that it's moved in the
15 direction of what you term "performance, science and
16 nature shows", is that correct?

17 MR. SCHAEFFER: You have to answer --

18 BY MR. RICH:

19 Q Verbal answer.

20 A Yes.

21 Q And has commercial television's program
22 fare moved in a similar direction, that is, to -- in

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1 the direction of more performance, science and nature
2 shows in the past 20 years?

3 A No, of course not.

4 Q Now, when you use the word prime time, how
5 do you define that?

6 A Between 7 and 11.

7 Q Okay, and I take it we've established that
8 the prime time programming fare of public television
9 is, in fact, considerably different from commercial?

10 A It is, yes.

11 Q And just as the overall programming fare
12 of public television has not markedly changed over 20
13 years, neither has its prime time fare, is that
14 correct?

15 A That's right.

16 Q Indeed, in your testimony you cite at page
17 7 remarkably little change in the series that form the
18 core of the prime time schedule, correct?

19 A Yes, that's right.

20 Q And indeed, you cite, I believe, seven
21 series at pages 7 and 8 of your testimony that remain
22 the mainstay of the PBS prime time schedule, correct?

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1 A That's right.

2 Q And you also talk about at page 19 of your
3 testimony, the prime time affair of the systems
4 largest station, WNET, don't you?

5 A Yes.

6 Q And you indicate there that three prime
7 time hours, as you define prime time, are devoted to
8 four five day a week shows as they're identified, is
9 that correct?

10 A That's correct.

11 Q And those shows are the New Jersey Network
12 News, the News Hour with Jim Lehrer, the Charlie Rose
13 Show, and the Nightly Business Report, is that
14 correct?

15 A That's right.

16 Q Now would you also agree, sir, that the
17 funding of -- strike that.

18 Would you agree that public television is
19 very different in its overall funding sources than
20 commercial television?

21 A Yes, of course.

22 Q Commercial television is supported 100

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1 percent by advertising dollars, correct?

2 A That's right.

3 Q And according to your testimony at page 14
4 and I guess one of the charts you sponsor, solely 15
5 percent of public television income is derived from
6 businesses and corporations, correct?

7 A Correct.

8 Q And governmental sources according to your
9 testimony in your chart supplies some 37 to 38 percent
10 of funding, is that correct?

11 A I've lost you --

12 Q That's the first two lines on the chart
13 which has been --

14 A Yes.

15 Q Given to you as a second chart today, yes?

16 A Yes.

17 Q Is there any commercial analog to the
18 federal, state and local government sources of funding
19 of public television that is on the commercial side?
20 Do commercial broadcasters see money from those
21 sources?

22 A Not that I know of, no.

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1 Q And colleges and universities going down
2 your chart supply, according to you, 9 percent of
3 public television financing, correct?

4 A Correct.

5 Q Is there any commercial analog to that?

6 A No.

7 Q And foundations supply 6 percent of public
8 television funding, correct?

9 A Right.

10 Q Is there any commercial analog to that?

11 A No.

12 Q And audience support, according to your
13 figures, accounts for 22 percent of public television
14 support, correct?

15 A Right.

16 Q Any commercial analog there?

17 A That's a difficult one because if I buy
18 the products advertised, is that not an audience
19 response to the commercial itself.

20 Q Let me narrow my question. Is there any
21 membership or auction or pledge programming analog on
22 ABC television network in securing funding for the

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1 network?

2 A No.

3 Q Now the chart that Mr. Schaeffer
4 reproduced from page 14 of your testimony, I'd like to
5 ask you a few questions about it, if I may.

6 A Okay.

7 Q Labeled changes in public television
8 income from 1980 through 1985. Do you have in front
9 of you?

10 A I have it in front of me.

11 Q Okay. Actually, what we need to do, sir,
12 if you don't mind, is actually go to page 14 of your
13 testimony itself for purposes of these questions.

14 Do you have that in front of you?

15 A Yes, I do.

16 Q All right now, in the text of page 14,
17 right above this chart, you state in relation to
18 viewer support that the proportion of support from
19 viewers has risen from 12.6 percent in 1980 to 21.3
20 percent in 1995, do you see that?

21 A Yes, I do.

22 Q Now can you tell me where those figures

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1 appear in the chart?

2 A They don't appear in the chart. I can't
3 explain what the discrepancy is.

4 Q So you don't know which is accurate, the
5 text or the chart?

6 A No, because my concern was the proportion
7 is more than the actual figures, that is the trend of
8 the growth of audience income.

9 Q If your concern was trends, why did you
10 put it out to one decimal point?

11 A Because, well, because I was copying it
12 from a source and I didn't want to corrupt that source
13 by changing it.

14 Q But you have no idea how the numbers
15 differ as between texts --

16 A No, I don't recall why the numbers differ.
17 I don't remember.

18 Q Did you personally prepare these numbers?

19 A Yes, I did.

20 Q Now if we go on and look at your statement
21 as to corporate support immediately following, it says
22 "corporate support of public television has risen from

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1 10 percent to 15 percent of the total funding for
2 public television." Yet, if we look at the chart it
3 appears that the percentages go from 11 percent to 15
4 percent. Can you explain that expression?

5 A I can't. It's obvious I was probably
6 using two different sources and failed to make an
7 updating of the source. I don't know what the --

8 Q Sitting here today do you know which, if
9 either, is correct?

10 A No, I do not.

11 Q Now, when we totalled your chart for 1995
12 which you list -- incidentally, when we look down the
13 column for 1995, I see some numbers which have a
14 decimal point and others which have commas. Was that
15 intention?

16 A No, of course not. Those were errors in
17 the preparation of these figures.

18 Q I take it they should have all been
19 decimal points since the chart is stated in millions
20 of dollars?

21 A Yes.

22 Q Now, if we assume that all of the commas

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1 are decimal points when we totalled up all of the
2 entries there listed, the number comes out not to
3 1,564,000,125, but instead 1,464,025,000, about
4 100,000,000 less than your total. Do you have any
5 knowledge of how that error occurred?

6 A Yes. Age.

7 (Laughter.)

8 Q Do you know the source of the \$100,000
9 error?

10 A No, I do not. I prepared these figures
11 myself from other sources, but --

12 Q Looking at the federal government line,
13 the right hand column under 1995 reports a federal
14 government income of less grants. Is that correct?
15 It says less grants?

16 A Yes, that's right.

17 Q Did you remove the amount of grant money
18 from the actual number for 1995, that is the \$262.695
19 million to your knowledge?

20 A Did I -- I'm sorry, I didn't understand
21 that.

22 Q In setting forth the number depicted under

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1 1995 which is reported to be a number, federal
2 government money less grants, do you know whether in
3 reporting that number to be \$262.695 million, you in
4 fact backed out the grant money?

5 A This is reported directly from the
6 Corporation for Public Broadcasting and I assume that
7 they had taken the grant money out since it says "less
8 grants." I did not change the figures from what I had
9 taken from the corporation.

10 Q Let me show you a document which is PB
11 Exhibit No. 4. I'm going to give you the whole
12 document from which PB 4 is derived, which is the 1995
13 CPB Statement of Public Broadcast Revenue. And I just
14 want to see if we can clarify any confusion on this
15 subject.

16 I'm going to ask you to turn to what's
17 marked as Table 2 in this document, Mr. Day.

18 A What page is that?

19 Q It's labeled at the bottom with a Bates
20 number.

21 A I've got it.

22 Q Okay. Now do you recall this as the

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1 source for preparation of the entry for 1995 as
2 appears in the table at page 14 of your testimony?

3 A No, I do not. I don't recall when I did
4 this some many months ago, I don't recall what the
5 source was at that time. Given an opportunity, I
6 could go back and check, but I don't know offhand.

7 Q If you would look with me at the first two
8 levels of entry, I'll represent to you that PT entry
9 is public television?

10 A Uh-huh.

11 Q And if you would look under Corporation
12 for Public Broadcasting, FY 1995, there's an entry of
13 \$214,230,000, do you see that?

14 A Yes, I do.

15 Q And if you'd look down under federal
16 grants and contracts below that, there's an entry of
17 \$48,565,000. Do you see that?

18 A I do.

19 Q And I'll represent to you that if you were
20 to add those two numbers together, you would arrive at
21 a number of \$262,795,000. Now that's close, although
22 not identical to the number you depict as a number

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1 less grant money in your chart. Is it possible you
2 made an error?

3 A It's quite possible I made an error. I
4 don't deny that. I've never seen this chart before
5 because I would have recognized the PBT breakdown so
6 I did not use this as the source.

7 It's very difficult to interpret figures
8 from public broadcasting because they tend to
9 represent different things at different times. It's
10 difficult to know what is included and what's excluded
11 because of the way the system is set up.

12 Q Do you find the presentation of the data
13 respecting federal funding and federal grants money as
14 confusing or difficult to interpret as it's set forth
15 in the document in front of you?

16 A I would have to study it further than
17 simply glancing at it to answer the question honestly.

18 Q Do you know incidentally whether the 1980
19 number which you contrast under federal government
20 funding, namely, \$152.396 million is inclusive or
21 exclusive of federal grant money?

22 A No, I don't.

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1 Q So you might be well comparing apples and
2 oranges here?

3 A Well, I suppose that's true. I don't know
4 what the extent of the federal grant money is other
5 than the Corporation for Public Broadcasting. I
6 assume it's a relatively minor figure, but I'm making
7 that assumption.

8 CHAIRPERSON GRIFFITH: Mr. Rich, we have
9 a question.

10 JUDGE DREYFUS: If you're going to use
11 this document and the witness has never seen this
12 document before, I think it's fair for someone to
13 point out that on that page 5 it says "fiscal year
14 1995" with an asterisk, the asterisk meaning
15 preliminary?

16 THE WITNESS: Yes.

17 MR. SCHAEFFER: Oh, I see.

18 JUDGE DREYFUS: So I mean I don't know if
19 the witness was using final figures or that nature.
20 I mean this is a preliminary internal document.

21 MR. RICH: Well, this is only meant to
22 test whether he in his computations, I appreciate your

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1 point very much, Judge Dreyfus, but whether in fact in
2 his math he included or excluded grants and I think at
3 least circumstantially since the number when you add
4 these two is almost identical to the number which is
5 reported to be less grants, I was trying to test
6 whether perhaps he made a methodological error and if
7 he doesn't know, he doesn't know.

8 THE WITNESS: I am more historian than
9 statistician, I've got to tell you that.

10 BY MR. RICH:

11 Q So I take it you are not sponsoring these
12 numbers as necessarily precise and accurate numbers,
13 that is, the numbers appearing at page 14 of your
14 testimony? Is that correct?

15 A No, my interest was the trend, not the
16 specific numbers.

17 Q Okay. Let's talk a little bit about the
18 trends, okay? Now I take it that in terms of trends
19 in corporate support as you testified in response to
20 Mr. Schaeffer, the trend in increasing corporate
21 funding has been one developing over a 20 year period,
22 correct?

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1 A That's right.

2 Q That's nothing that developed last year or
3 two or three or even five years ago, correct?

4 A No, it actually predates 1978. Again, but
5 has increased in volume.

6 Q And if you would look back at this same
7 chart, is it not accurate that over the period you
8 here depict which is a 15 year period, audience
9 support has actually grown at a greater rate than
10 corporate support?

11 A That's right, yes.

12 Q And do you know over the past five year
13 period what the rate of corporate support for public
14 television has been both in terms of dollars and in
15 terms of percentages of total income, how the last
16 five year period is compared?

17 A No, I don't.

18 Q You indicated, I believe, in response to
19 Mr. Schaeffer that you understand the phenomenon of
20 seeking corporate underwriting money as driven out of
21 necessity, correct?

22 A That's correct.

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1 Q I take it you had a similar instinct when
2 you initiated the idea of auctions back at KQED, yes?

3 A Similar instinct in terms of
4 self-preservation, yes, precisely.

5 Q That's a strong instinct, isn't it?

6 A Absolutely.

7 Q Now I believe you testified that to your
8 eye and ear the enhanced underwriting which you have
9 been exposed to or at least some of it is I think in
10 your words to Mr. Schaeffer almost indistinguishable
11 from commercial TV?

12 A That's right.

13 Q But I take it as one who is expert in this
14 field, you're also aware that there are very
15 significant underwriting guidelines which at least the
16 PBS feed of programs are subject to?

17 A Absolutely.

18 Q And do you agree with me that about two
19 thirds of all programming that appears on public
20 television represents the PBS feed? Is that a
21 statistic you're generally familiar with?

22 A No, I'm not familiar with that and I'd

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1 have to examine those figures because I would doubt
2 that that is the case. But I don't have the figures
3 so I can't answer the question.

4 Q You're aware, aren't you, that the PBS
5 underwriting guidelines prohibit what are called calls
6 to action?

7 A That's right.

8 Q Can you describe for the Panel what a call
9 to action is?

10 A Well a call to action, I suppose simply
11 put would be to buy this product.

12 Q I take it you're also aware that the PBS
13 underwriting guidelines prohibit what they term
14 superlative descriptions or qualitative claims about
15 a company, its product or its services?

16 A That's right.

17 Q And I take it you're also aware that those
18 same guidelines prohibit direct comparisons with other
19 companies or with other companies' products or
20 services?

21 A That's right.

22 Q As well prohibits the furnishing of price

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1 or value information?

2 A Yes. I think that's in my testimony as a
3 matter of fact.

4 Q And as well prohibits inducements to buy,
5 sell, rent or lease, for example, six months free
6 rent?

7 A That's right.

8 Q And as well prohibits endorsements,
9 recommended by four out of five doctors, that kind of
10 thing?

11 A Yes, right.

12 Q And are you familiar with the fact that in
13 interpreting these standards and limitations that the
14 FCC has from time to time written opinions expressing
15 its views as to proper and improper underwriting
16 practice in industry?

17 A Correct.

18 Q And I take it you're also familiar that
19 they've sort of created a list of forbidden words or
20 adjectives, if you will, for purposes of underwriting?

21 A Yes, I understand that's the case.

22 Q And I take it you're familiar with the

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1 fact that those words, that is words that cannot be
2 used include such words as "luxury, reliable,
3 efficient, economical, prompt, dependable, number one"
4 and the like?

5 A That's right.

6 Q I take it you're also aware that under the
7 PBS guidelines corporate spokespeople if they appear
8 have to keep their mouth literally shut, they cannot
9 speak?

10 A No, I was not aware of that, but I think
11 I should also point out that the PBS guidelines apply
12 only to PBS programming. Each of the 173 stations
13 have their own guidelines which in most cases are more
14 liberal than PBS's, that is most cases in the large
15 cities. I shouldn't say most cases, not 173.

16 Q But you would agree with me that those
17 guidelines apply to the portion of their program day
18 which does not consist of the PBS feed, correct?

19 A No. I don't think so. Let me give you an
20 example. When the PBS feed comes on on Channel 13 of
21 the News Hour with Jim Lehrer, there is a credit
22 inside of that program for Archer Daniels Midland, but

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1 that program is preceded by two, at least two
2 commercials on Channel 13 saying that this program
3 appears on Channel 13 by virtue of and so forth.
4 That's pretty common practice among the larger
5 stations. The PBS has a time limitation on the
6 underwriting credits that does not pertain -- I think
7 it's 15 seconds as I remember, but 30 seconds on the
8 stations that precede the 15 second underwriting
9 credit on that. So there is a difference between the
10 PBS rules and the station rules.

11 Q Staying with the PBS rules for the moment,
12 I take it you're also aware that there are even more
13 stringent limitations on underwriting credits
14 associated with children's programming, correct?

15 A I'm not aware of that. I would hope
16 that's the case, but I don't know it to be the case.

17 Q Okay. Now you indicated toward the end of
18 your direct examination by Mr. Schaeffer that friends
19 told you, words to that effect, that KQED looks very
20 commercial, yes?

21 A Yes.

22 Q I take it that's not from your first hand

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1 observation then, is it?

2 A Yes, it is because I visit QKED, I visit
3 San Francisco two or three times a year and yes, I've
4 watched QKED and yes, I would come to the same
5 conclusion. Not any more so than Channel 13 in New
6 York, however.

7 Q Now in your written testimony you
8 indicate, do you not, that KQED rejects 39 out of 40
9 proposed underwriting --

10 A This is what I was told by KQED, yes.

11 Q May I finish the question for the record?
12 Rejects 39 out of 40 proposed underwriting messages?
13 That's at page 18 of your testimony?

14 A That was told to me by the President of
15 QKED. I don't know if that's a fact, but it was
16 certainly stated by her, that that's what it is.

17 Q Do you have reason to disbelieve it?

18 A No, I don't.

19 Q The President of the station ought to
20 know, yes?

21 A She happens to be a person for whom I have
22 great respect, incidentally, so yes.

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1 Q I take it that your references to WTTW's
2 underwriting practices is a reference to practice of
3 some long time standing on the part of that station,
4 correct? Not a new set of underwriting practices by
5 that particular station, correct?

6 A What do you mean by underwriting
7 practices?

8 Q In your testimony you make certain
9 references to WTTW and its use of enhanced
10 underwriting, do you recall that?

11 A Yes.

12 Q My only question is you weren't suggesting
13 that has sprung fully blown in the very recent past as
14 opposed to a practice of some standing by that
15 station, correct?

16 A I think that is correct, yes.

17 Q Now you -- your testimony at page 5 also
18 indicates that most institutionally based stations
19 don't accept commercials, correct?

20 A I simply know that there are instances
21 where the licensee is a state authority or it may be
22 a college or university. I don't know of specific

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1 instances, but in all the meetings I have sat in over
2 the years in public television councils there has
3 always been this group of people who say look, we
4 can't run these things on our stations because of
5 state law will not permit or the college trustees will
6 not permit it. I don't have specific citations for
7 that, but certainly it's in my head because it's been
8 put there through countless meetings.

9 Q Well, if as you assert at page 5,
10 "institutionally based stations for the most part are
11 opposed to the idea" meaning the idea of accepting
12 commercials, yes --

13 A Yes.

14 Q Then if you're correct in that, then a
15 majority and maybe a substantial majority of public
16 television stations across the country don't engage in
17 enhanced underwriting practices. Wouldn't that be
18 correct?

19 A I can't be certain where the line is
20 drawn. Quite obviously these stations are running PBS
21 shows with underwriting credits on them. When we talk
22 about enhanced underwriting and underwriting and

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1 commercials, it's very difficult to draw a clear line
2 between these concepts or between the terms, not the
3 concepts. So I don't know what their problem is. I
4 know that they're probably carrying -- I'm sure
5 they're carrying PBS shows of underwriting credits,
6 but they may not be using local underwriting credits
7 as community stations do.

8 Q If you'd turn to page 4 of your testimony,
9 please, speaking of the stations and their
10 compositions. You talk about 352 outlets, do you see
11 that?

12 A Yes, I do.

13 Q And then in the next sentence you say the
14 347 stations are operated by. Is that another error
15 in terms of mixing numbers?

16 A Yes, it is.

17 Q Which is the right number?

18 A I don't know because the number of public
19 broadcasting outlets seems to vary depending on the
20 source you use. The number of licensees doesn't vary,
21 but the number of stations seem to vary. I generally
22 said approximately 350 stations and I should have said

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1 it here.

2 Q Now you do talk about 173 licensee
3 organizations that divide into four distinct
4 categories?

5 A Yes.

6 Q When I added your four distinct
7 categories, I came up with 186. Can you explain that?

8 A No. This was taken directly from
9 documents that I used from PBS.

10 Q So are you suggesting the documents were
11 in error or your transposition was in error?

12 A Yes, I would like to if I could, but since
13 you've indicated other errors, it's always a
14 possibility that I made an error. I don't think
15 that's the case here, but I don't know.

16 Q Are you suggesting to me that your
17 reference to 173 licensee organizations divided into
18 four distinct categories, 26, 62, 8 and 90 came
19 directly out of a document?

20 A Yes.

21 Q What document?

22 A I'd have to go back and look at my notes

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1 and tell you that. I don't remember which document
2 that was.

3 Q I take it you would agree, Mr. Day, that
4 there is a natural limit on the extent to which public
5 broadcasting can come to resemble commercial
6 television in respect of running full blown
7 commercials?

8 A A degree of difference? Is that the
9 question?

10 Q No, pardon me, I wasn't clear. Do you
11 agree that there is a natural limit on the extent to
12 which public television can run full blown commercials
13 without encountering undue viewer resistance?

14 A Oh yes. Of course.

15 Q What happens after a certain point as you
16 see it?

17 A You violate the FCC regulations.

18 Q What about viewer reaction? Do you have
19 a sense of that?

20 A No, I don't and as I indicated in my
21 testimony that the one test that was made, there was
22 very little negative viewer reaction to commercials

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1 would surprise me.

2 Q Are you familiar with Mr. Ledbetter, at
3 least by reputation?

4 A I know him, but not very well. I recall
5 his reputation and I've read his books.

6 Q Are you aware that he gave testimony here?

7 A Yes, I am aware of that.

8 Q And you have respect for his viewpoint?

9 A Yes. It's interesting, particularly --
10 this may or may not be relevant, where he deals with
11 the early history of public television he was either
12 not born or very young, so his history is based upon
13 his research. Mine is based upon experience. I'd
14 like to think we're both right, but we do take a
15 somewhat different interpretation of the same facts.

16 Q As between you and he, I take it from your
17 answer, you believe your history is more
18 authoritative?

19 A No, I'd say his may be more authoritative
20 than mien. I don't know. I'm simply saying that we
21 do take -- we do have a different perception of the
22 same facts and I don't know that either is right or

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1 either is wrong.

2 Q And your perception is born from a career
3 in the industry and his is born from research, is that
4 your point?

5 A Yes.

6 Q Now --

7 A This is the earliest --

8 Q And Mr. Ledbetter states in his book at
9 page 215 that "station experimentation with commercial
10 messages has already reached the point where it
11 creates viewer backlash" and then farther down the
12 paragraph "audience members are bound to cease
13 donating to a public broadcasting service that relies
14 on advertising or other commercial schemes."

15 Do you generally agree with that?

16 A I have no evidence. All the evidence I
17 submitted here was 1983 and whether the situation, the
18 attitude toward, of audiences toward these messages
19 has changed, I don't know.

20 Q Do you have a view, Mr. Day, as to how
21 this Panel is to go about setting fees to be paid to
22 ASCAP and BMI?

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1 A No, I don't. I was asked only to look at
2 the history and interrelationships of public
3 television and I don't have a view on this. I think
4 that's to be left to those who are more expert in this
5 area than I.

6 MR. RICH: Thank you, I have no further
7 questions.

8 CHAIRPERSON GRIFFITH: All right, any
9 Redirect?

10 REDIRECT EXAMINATION

11 BY MR. SCHAEFFER:

12 Q I have a couple of questions, mostly in
13 the nature of clarifications. You had said something
14 about Sesame Street may yet have a role in commercial
15 television. What did you mean by that?

16 A Well, my understanding is that the most
17 recent negotiations with PBS were a bit chancey. I
18 don't know the background and I shouldn't say anything
19 more than I have heard two people speak of how close
20 it came to -- how close PBS came to losing Sesame
21 Street. I don't know the facts.

22 Q When you say "losing Sesame Street" do you

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1 mean losing Sesame to some division or group of
2 commercial television?

3 A Yes, since commercial television turned it
4 down initially, the situation has now changed with
5 respect to commercial television since they're under
6 obligation to provide more children's programming and
7 they're obviously looking for the most popular.

8 The contract which was apparently arrived
9 at between PBS and Children's Television Workshop does
10 allow for the use of Sesame Street programs on
11 commercial cable after a certain period of time. I
12 have forgotten whether that time is two years or more.

13 Q To what extent, I take it at the present
14 time television is divided up into things other than
15 networks, is it not? Other than network broadcasters?

16 A Commercial television?

17 Q Yes.

18 A Yes.

19 Q And to what extent would you say that
20 cable television has similarity with the fare that is
21 being offered by public television at the present
22 time?

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1 A Well, there are similarities to be sure.
2 In fact, there are more than similarities. In some
3 cases, cable is running programs that have run on
4 public television or programs from the same sources
5 such as the BBC. The distinction between cable and
6 public broadcasting obviously has been reduced by
7 recent experience to be sure.

8 On the other hand, I feel very strongly
9 that cable relies heavily upon other productions from
10 other sources, including the BBC and syndicated
11 sources. I believe public television's obligation or
12 even opportunity is to create programs, not to buy
13 them and to run them from other sources.

14 Q Other than -- I understand your view of
15 the mission of public television and I think we all
16 honor it and we all respect it. But at the present
17 time, would you say that much of the material that is
18 on cable television is precisely the same kind of
19 semi-commercial or commercial material which is on
20 public television?

21 A Well, I'm not sure I agree with the semi-
22 commercial or commercial, because that's a judgment

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1 that would have to be made by looking at the shows,
2 but the content of the shows, yes, there's a strong
3 similarity.

4 Q And is there also in connection with cable
5 television, isn't it also true that people who watch
6 cable television pay for that pleasure?

7 A Yes, I feel rather strongly about that
8 since public broadcasting doesn't get a dime of that
9 money that they're paying for.

10 Q Well, but isn't it true that somebody who
11 watches cable television in your city, for example,
12 will pay money to subscribe? Isn't that correct?

13 A You have to, yes.

14 Q And that's not true of network television,
15 is it? In other words, when you watch WCBS TV in New
16 York, you don't pay for that pleasure, you buy a
17 television set and you listen. Isn't that correct?

18 A That's correct except that when you live
19 in Manhattan you pay to get WCBS or you get a fuzzy
20 picture.

21 (Laughter.)

22 Q Nevertheless, when our friends at

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1 Manhattan Cable say to us well, do you want to watch
2 the Discovery Channel or do you want to watch any of
3 the other basic package, you have to pay for it, don't
4 you?

5 A Yes.

6 Q So each subscriber pays a sum, lured on by
7 the attraction, I take it, of what the particular
8 cable service is offering, is that correct?

9 A Except in Manhattan where it's a matter of
10 getting a clearer picture.

11 Q Necessity.

12 A Everywhere else in the country --

13 Q Some of the more distant parts of Vermont
14 and other places, cable does serve a similar function,
15 does it not? I'm not necessarily talking about the
16 service, but to get the picture?

17 A Yes, that's right.

18 Q And I don't want to minimize that. On the
19 other hand, in true fact, in your own city I think not
20 uncommonly, if one wants certain premium services,
21 HBO, Cinemax, things of that sort, you pay even more
22 for it, don't you?

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1 A Yes, that's right.

2 Q So there is a certain similarity in the
3 cable business that one seeks from people who are
4 interested in watching your programs, you get money
5 for it in order to survive, in their case to make
6 profit and to produce new programs, isn't that
7 correct?

8 A That's correct and I'm only sorry that
9 public broadcasting hasn't got the same hold upon the
10 audience that cable does because public depends upon
11 what we used to call pay TV on the honor system. And
12 we discovered quickly that the honor system is not the
13 firmest foundation upon which to build an enterprise.

14 Q Pay TV on the honor system, but it's
15 certainly true in your opinion, is it not, that the
16 public television broadcasters of necessity are
17 seeking to sell to obtain subscribers by reason of
18 that which they put on television. Isn't that
19 correct?

20 A Yes, I would have to say --

21 Q Isn't one of your criticisms --

22 MR. RICH: I'm not sure he completed his

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1 answer.

2 BY MR. SCHAEFFER:

3 Q I'm sorry. Did you complete your answer?

4 A Yes. I did complete it.

5 Q Isn't that one of your criticisms of
6 public television, that they have skewed, maybe of
7 necessity, maybe for whatever reasons, they have
8 skewed their programming to those programs which are
9 likely to be the subject of subscriptions and
10 underwriting?

11 A Well, to me it's one of the funniest
12 things that has happened is that we used to have to
13 put on programs of Frank Sinatra to attract audiences
14 old enough to have discretionary income and the habit
15 of giving to organizations where they could get it
16 free by not paying. Now they are running the Beatles
17 and rock, which indicates the aging of the audience.
18 Because you have to assume that only people over 50
19 will pay for something that they can get free, and
20 also have the discretionary income to do that kind of
21 thing. Yes, you have to appeal to an older audience
22 in order to get those memberships. The kind of

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1 programs that they run during their fund drives I
2 think gives evidence of this.

3 Q What do you mean, the kind of programs
4 they run during their fund drives?

5 A Well, I would like to give you some
6 examples, but I am so unacquainted with the musical
7 groups I can't tell you. Yanni, for example. That is
8 the biggest fundraiser. It's a show that brings in
9 the most money. I don't even know who Yanni is.

10 Q For your information, Yanni is an ASCAP
11 member.

12 A As you know, public television comes on,
13 we get this repeated on channel 13, "Please send us
14 money so we can broadcast more of these kinds of
15 programs." Those kinds of programs you don't get
16 until they ask for money the next time. You get other
17 kinds of programs in between. It's a very practical
18 way of raising money.

19 Q Has it been your perception that these
20 pledge programs that you have been seeing on public
21 television have used music?

22 A (No response.)

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1 MR. RICH: I have been very patient, but
2 this is going so far beyond the --

3 MR. SCHAEFFER: Okay. I'll withdraw the
4 question. I'll withdraw the question.

5 BY MR. SCHAEFFER:

6 Q Can you think of some of the programs that
7 you have seen been the basis for the pledge drives on
8 public television in the larger market?

9 A (No response.)

10 MR. RICH: Same objection.

11 CHAIRPERSON GRIFFITH: The objection is
12 overruled.

13 BY MR. SCHAEFFER:

14 Q Go ahead. You can answer.

15 A I don't watch the programs during the fund
16 drives.

17 Q Okay. Touche. You have also said, for
18 example, that it was difficult to draw the line
19 between commercials, enhanced underwritings, and
20 underwritings, those three categories. Would you tell
21 us why it is difficult to draw that line?

22 A (No response.)

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1 MR. RICH: May I, as a form objection,
2 inquire whether we're asking whether he's testifying
3 that he has difficulty drawing the line or some
4 prototypical public television is drawing the line?

5 MR. SCHAEFFER: Mr. Rich, he answered the
6 question that -- I don't know what he meant. He said
7 it was difficult, literally that's what he said, it
8 was difficult to draw the line between commercials,
9 enhanced underwritings, and underwritings.

10 BY MR. SCHAEFFER:

11 Q So if you would explain to us first to
12 accommodate Mr. Rich, whether you were speaking for
13 yourself or you were speaking in general, and
14 secondly, what the difficulty was.

15 A I was speaking for myself, but I was
16 speaking about the use of the terms more than I was
17 about the program segment itself. I think I can
18 fairly clearly determine what a commercial is.

19 But once again, as Mr. Rich has pointed
20 out, there are limitations upon the kinds of
21 underwriting messages that public broadcasting can
22 air, whether you call them commercials, you could call

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1 them enhanced underwriting, it's clear what the
2 limitations are. But the terms I think tend to be
3 somewhat confusing. Now the FCC may very well have a
4 very specific definition of what enhanced underwriting
5 is. It certainly includes a limitation as Mr. Rich
6 has pointed out.

7 But I was speaking of the confusion in the
8 use of the terms.

9 Q You also testified on cross that the
10 underwriting material you have seen on the public
11 television stations are similar to commercial
12 advertising. Would you tell us what makes them
13 similar?

14 A Because they are sometimes the same 30
15 second message is broadcast on commercial TV as is
16 broadcast on public.

17 Q What do you mean by that?

18 A There are certain underwriting credits, 30
19 second underwriting credits on local stations that are
20 the same 30 second commercial one might find on
21 commercial TV. Now I can't give you an example. It's
22 from personal observation. If I had an example, I

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1 would provide it to you. I simply have seen this more
2 than once.

3 Q One final question subject and then I'll
4 leave you be. I just wanted to understand this, and
5 I think I do. You have said that because the PBS
6 guidelines don't apply to non-PBS transmissions there
7 is a kind of loading up there, maybe a 15 second to a
8 some spot on the PBS material preceded by as much as
9 30 seconds of underwriting material or commercials,
10 depending on which side of the table you are on. So
11 it makes a 45 second spot in effect. Is that what you
12 are saying?

13 A Yes. Although I am not absolutely certain
14 of the number of seconds. It's absolutely true. It
15 is something that bothers PBS. If PBS gets a
16 corporation to underwrite a program, they don't want
17 that program preceded with someone else's underwriting
18 credits. But that lies within the province of the
19 station. The stations do it. They do it all the
20 time.

21 MR. SCHAEFFER: That will be my last
22 question.

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1 CHAIRPERSON GRIFFITH: All right.

2 MR. KLEINBERG: No questions.

3 CHAIRPERSON GRIFFITH: Thank you. May
4 this witness be excused?

5 MR. RICH: Yes, Your Honor.

6 CHAIRPERSON GRIFFITH: Mr. Day, thank you
7 very very much, sir. You may step down. You are free
8 to go.

9 THE WITNESS: Thank you very much.

10 MR. SCHAEFFER: My next witness is Horace
11 Anderson.

12 CHAIRPERSON GRIFFITH: All right.

13 Whereupon,

14 HORACE ANDERSON
15 was called as a witness, and after having been duly
16 sworn, was examined and testified as follows:

17 MR. SCHAEFFER: It will just facilitate
18 things if we break apart the exhibits.

19 DIRECT EXAMINATION

20 BY MR. SCHAEFFER:

21 Q Mr. Anderson, would you state what your
22 occupation is?

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1 A Currently I am a management consultant
2 working in New York City.

3 Q Are you an attorney admitted to practice
4 in the State of New York?

5 A Yes. I am.

6 Q By whom were you employed prior to your
7 employment with your present employer?

8 A By White and Case.

9 Q And you were employed as an associate in
10 that law firm?

11 A Yes. I was.

12 Q Incidentally, when did you come to work with
13 White and Case?

14 A In September of 1996.

15 Q Were you asked by me to prepare a
16 comparison and analysis in connection with this
17 matter?

18 A Yes. I was.

19 Q What were you asked to do?

20 A I was asked to compare the salary
21 structures of commercial television stations to those
22 of public television stations and of commercial radio

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1 stations to those of public radio stations.

2 Q And did you have any particular expertise
3 in radio or television in order to make this
4 comparison?

5 A No. No particular --

6 Q How did you go about doing that?

7 A I went about doing this comparison by
8 using a series of reports published by the National
9 Association of Broadcasters and by the Corporation for
10 Public Broadcasting.

11 Q And those reports were, as you understood
12 it, describe the structure of the reports before I
13 show them to the arbitrators.

14 A My understanding of the reports is that
15 they are reports that are produced annually or
16 periodically at least by these two organizations, and
17 that the information gathered in them is obtained by
18 doing surveys of member stations.

19 The information in them is broken down in
20 various ways. In certain portions of the reports the
21 information is broken down based on the size of the
22 station in terms of budget and in terms of revenues,

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1 and then certain other parts of the report are broken
2 down geographically.

3 Q And I take it this information is
4 contained in the report itself, these breakdowns?

5 A Yes.

6 Q I am going to show you exhibits 700 and
7 701. Are these the NAB, the National Association of
8 Broadcaster reports that you utilized?

9 A Yes. They are.

10 Q I am next going to show you Exhibits 310
11 and 311, ASCAP 310 and 311. Are these the Corporation
12 for Public Broadcasting reports that you used?

13 A Yes. They are.

14 Q And I am going to show you Exhibit 721.
15 Is that the series of charts that you made out, that
16 you prepared using those two reports?

17 A Yes. This is the report I prepared.

18 Q And what do the charts purport to show?

19 A They purport to show a comparison of the
20 average salaries paid by commercial stations versus
21 those paid by public stations in particular job
22 categories. They purport to compare similarly sized

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1 stations in terms of the budget in the case of public
2 stations and annual revenues in the case of commercial
3 stations.

4 Q But as far as you are concerned, the
5 information that you need for the categories and the
6 equivalence were entirely obtained from these reports,
7 not from your independent experience, which you have
8 none?

9 A All of the information is from the NAB and
10 CPB reports.

11 MR. SCHAEFFER: I offer Exhibits 700, 701,
12 310, 311 and 721 into evidence.

13 CHAIRPERSON GRIFFITH: Any objection?

14 MR. WEISS: These were previously the
15 subject of --

16 MR. SCHAEFFER: No. They were not.

17 MR. WEISS: All I was going to say, if I
18 can be heard, is that I believe she was listed as the
19 sponsor in ASCAP's original papers. Nevertheless, we
20 have no objection to these documents coming in through
21 this sponsoring witness.

22 MR. SCHAEFFER: I have no further

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1 questions for this witness.

2 CHAIRPERSON GRIFFITH: All right. They
3 will be marked and received as ASCAP -- oh, they are
4 already in.

5 MR. SCHAEFFER: Are they already in?

6 CHAIRPERSON GRIFFITH: Weren't they
7 submitted with your direct case?

8 MR. GULIN: They are with the Grajeda,
9 yes. But I mean I don't remember who the sponsoring
10 was, to be honest with you. They are in now. You
11 have them in your packets if you don't want to bother
12 with a separate sheet. You may want them for cross
13 examination though.

14 MR. WEISS: My suggestion would be that
15 you -- because I am going to be going through a fair
16 bit of detail with some of these reports. It might be
17 helpful for you all to have that.

18 MR. GULIN: Would it be fair to say that
19 we were handling this is then is that the motion to
20 strike is denied with respect to these documents?

21 MR. WEISS: He is withdrawing.

22 MR. GULIN: He's withdrawing. That's

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1 fine.

2 CHAIRPERSON GRIFFITH: Thank you. The
3 record will so reflect.

4 MR. WEISS: Your Honors, I am going to beg
5 a little bit of indulgence here. I tried to also make
6 some blowups of some of the relevant pages of these
7 charts. Given the awkward layout, I'll try to do the
8 best I can. I might impose upon my colleagues from
9 White and Case to perhaps borrow your easel.

10 MR. SCHAEFFER: Sure.

11 MR. WEISS: It might help facilitate this
12 process a bit as well.

13 MR. SCHAEFFER: I think it belongs to the
14 --

15 CHAIRPERSON GRIFFITH: Mr. Kleinberg,
16 while he is getting ready, I neglected to ask you, do
17 you have any questions for the witness?

18 MR. KLEINBERG: I do, Your Honor.

19 CHAIRPERSON GRIFFITH: The record will so
20 reflect.

21 CROSS EXAMINATION

22 BY MR. WEISS:

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1 Q Mr. Anderson, you indicated that you are
2 not an expert in public broadcasting or commercial
3 broadcasting salary structures, are you?

4 A That is correct.

5 Q You are not an expert in public
6 broadcasting or commercial broadcasting more generally
7 either are you?

8 A That is correct, other than as a viewer.

9 Q And you prepared this chart marked as
10 ASCAP Exhibit 721 under the instruction of Mr.
11 Schaeffer, who was the partner in charge of this at
12 White and Case. Correct?

13 A Correct.

14 Q And you obtained this assignment through
15 the regular assignment process that associates go
16 through at White and Case to obtain work. Correct?

17 A That is correct.

18 Q You had no involvement in the creation of
19 any of the reports underlying the documents that led
20 to ASCAP Exhibit 721, did you?

21 A As I said before, they were prepared by
22 CPB and NAB.

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1 Q Prior to your preparing ASCAP Exhibit 721,
2 had you ever had occasion to work with the NAB or CPB
3 reports before?

4 A No.

5 Q Did you know that those reports even
6 existed before you prepared Exhibit 721 for purposes
7 of this proceeding?

8 A I can't recall whether I knew of their
9 existence before that.

10 Q In any event --

11 A I had never worked with them.

12 Q There is nothing that you had had occasion
13 to use in your professional career?

14 A Correct.

15 Q I noticed in your testimony that you
16 graduated from college with a B.S. in 1979.

17 A 1991.

18 Q Oh. 1991? I apologize.

19 A I was only nine years old in 1979.

20 Q Okay. Then I think we have identified a
21 typo. I assume we can just correct manually the
22 testimony.

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1 Prior to going to law school, you didn't
2 work in the television or commercial or public
3 television or commercial or public radio industries,
4 did you?

5 A In any of those industries, no.

6 Q Your testimony at paragraph five indicates
7 that the comparison and analysis that you make in
8 Exhibit 721 is based upon your assumption that the
9 various job categories listed are the same. Is that
10 right?

11 A That is correct.

12 Q You are simply assuming that categories
13 with similar names or similar titles are the same
14 positions that broadcast radio, excuse me, public
15 radio and public television stations on the one hand,
16 and their commercial counterparts on the other.
17 Correct?

18 A A common sense assumption, yes. That a
19 program director, that the title program director
20 means something similar in both settings.

21 Q And it's true, is it not, that other than
22 I believe it's the NAB television report, Exhibit 700,

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1 which has a description of some of the job categories
2 for what they call I believe clerical support, I think
3 we can find the exact title, none of the other reports
4 indicate what these particular positions refer to.
5 Correct?

6 A That is correct.

7 Q So that all of these job category
8 comparisons are based again upon your assumption that
9 these are the same.

10 A Yes.

11 Q In fact, you have no actual knowledge that
12 these job categories are the same. Do you?

13 A Actual knowledge --

14 Q That a chief executive president of a
15 public television station is the same position as a
16 general manager of a commercial television station.
17 Correct?

18 A Other than kind of anecdotal evidence
19 where I have seen a public television general manager
20 referred to as the head of the station or the person
21 running the station, and knowing what a chief
22 executive officer is, other than that, no.

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1 Q This is anecdotal evidence that you relied
2 upon in creating these charts?

3 A Anecdotal evidence contributing to the
4 common sense assumption of how similar these job
5 titles are.

6 Q To these assumptions. Okay. Would you
7 agree that one possible assumption is that many of the
8 job categories reflected in the commercial radio and
9 television charts and the public radio and television
10 charts are in fact quite different?

11 A Would I agree that that makes sense?

12 Q That that's certainly one possible
13 assumption.

14 A That's a possibility. There are many
15 possible assumptions. That's one, and the assumption
16 that I made I think also is a possible assumption.

17 Q It wouldn't be unreasonable perhaps to
18 assume that there are differences between the two job
19 functions in commercial and public radio and
20 television would it?

21 A What kind of jobs are you talking about?

22 Q Why don't we go through and perhaps we can

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1 see. What I would like to do is if you could start
2 with looking at the radio chart that you have prepared
3 over here.

4 A Okay.

5 MR. WEISS: I am going to ask Your Honors
6 if you would like to follow along, to refer to page 13
7 of Exhibit 721.

8 BY MR. WEISS:

9 Q Now, Mr. Anderson, this is a chart that
10 says all stations. Correct?

11 A Correct.

12 Q In the underlying public radio and
13 commercial radio --

14 A (No response.)

15 MR. DREYFUS: One second.

16 MR. WEISS: I apologize. It's Exhibit
17 721, Your Honor.

18 MR. SCHAEFFER: It's the typewritten one.

19 MR. DREYFUS: Got it.

20 CHAIRPERSON GRIFFITH: Thank you.

21 MR. DREYFUS: What page are we on?

22 MR. WEISS: Page 13.

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1 CHAIRPERSON GRIFFITH: Okay.

2 BY MR. WEISS:

3 Q Now I would just like to walk you through
4 this page of the chart so that we're all understanding
5 what was done here. First, as I mentioned this is all
6 stations chart.

7 A Correct.

8 Q Now what you did was to analyze certain of
9 the stations that fell within different for the public
10 radio stations, budget ranges, and for the commercial
11 stations, revenue ranges, and compare stations that
12 fell within those two relative ranges. Correct?

13 A That's correct.

14 Q That was based on your assumption that a
15 commercial radio station that earns revenues of less
16 than \$500,000 is comparable or the same as a public
17 radio station earning less than \$450,000, as one
18 example. Correct?

19 A Correct.

20 Q But in addition, you also compiled data
21 based upon underlying charts within the public and
22 commercial tables that you relied on that look not

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1 only at those individual budget and revenue ranges,
2 but that looked at the whole country overall.

3 A That is correct.

4 Q So that this chart, the all stations chart
5 for radio reflects the result of analyses of the
6 entire nation, not just individual ranges of revenue
7 and budget. Correct?

8 A Correct.

9 Q Now looking over here in the lefthand
10 column, the first item before the double dash is Chief
11 Exec/President. In each of these items, the first
12 item before the double dashes refers to the title as
13 reflected in the public television report, the CPB
14 report, which is Exhibit -- excuse me, public radio
15 CPB report Exhibit 310. Correct?

16 A Right.

17 Q And the second listing after the double
18 dashes is the title that's referred in the NAB report
19 for radio in this regard. Correct?

20 A Correct.

21 Q Then if I'm correct, these reflect the
22 average listings for these titles, for public stations

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1 in the middle column?

2 A Correct.

3 Q And then the righthand column indicates
4 the average listed in the all radio stations chart for
5 these particular titles in the commercial radio
6 broadcasting world. Correct?

7 A Right.

8 Q The public chart, the public radio salary
9 report identifies 48 different positions that it
10 analyzes. Correct?

11 A Yes.

12 Q The commercial radio chart identifies only
13 36 different positions. Is that right?

14 A Actually I would like to be able to look
15 at the --

16 MR. WEISS: I believe he has a set right
17 there.

18 BY MR. WEISS:

19 Q If you'd like, I would refer you to page
20 one of Exhibit 310. You will see in the second
21 paragraph, it says a total of 48 positions that are
22 identified in this report.

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1 A Right.

2 Q If you'll look at the blowup of the all
3 stations chart. For commercial television, I just
4 counted up and I came to 36 different positions in
5 this regard as well. If you would like to check my
6 math, that's fine.

7 A I will. Thanks. Okay.

8 Q Do you have any understanding as to why
9 there are 48 positions reported in public broadcasting
10 and only 36 in commercial radio broadcasting?

11 A I do not.

12 Q The top position again, let's go back to
13 the first line here. It's chief executive/president.
14 The highest salary listed here, for the top executive
15 your assumption within a public radio station.
16 Correct? That individual earns on average at the
17 average public radio station in the United States,
18 \$50,243 dollars.

19 A In salary.

20 Q In salary. And that's simply salary?

21 A Yes.

22 Q There are no additional items as well?

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1 A Not reported in the report that I used.

2 Q So they may earn something else, but it's
3 not included within the report.

4 A It is a salary report. So items other
5 than salary are not included.

6 Q But that's not necessarily true with the
7 commercial. Is it?

8 A Right. If you look at the chart, the
9 title is average total compensation for the commercial
10 stations.

11 Q Right.

12 A They reported total compensation. Whereas
13 the public stations only reported salary.

14 Q Well you don't know for a fact that there
15 is anything other than a salary earned by a chief
16 executive/president at a public radio station, do you?

17 A All I know is that the reported salary and
18 not total compensation. That's all I know for sure.

19 Q Total compensation includes things like
20 bonuses. Correct?

21 A Bonuses, right.

22 Q Do you have any idea whether a chief

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1 executive/president of a public radio station is even
2 entitled to a bonus?

3 A What kind of idea do you mean? I have
4 read that chief executives of public stations do
5 receive bonuses.

6 Q You did that in connection with preparing
7 this chart or you subsequently read that?

8 A In connection with preparing this
9 particular chart, no. But in the course of -- just in
10 the course of doing reading on public stations I have
11 read that. But this is not knowledge coming from
12 working in a public station obviously.

13 Q Now it's your understanding though that
14 the chief executive and president of a public radio
15 station is the top official within that station.
16 Correct?

17 A It's my understanding.

18 Q Now the general manager, it's your
19 understanding is the highest ranking official in the
20 commercial radio station. Correct?

21 A That is the assumption I made.

22 Q That's the assumption you made, but you

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1 are not sure? It's simply an assumption. You are not
2 certain about that.

3 A Right.

4 Q What I would like you to do is take a look
5 at -- this is a blowup of the all stations chart from
6 ASCAP Exhibit 701 and it's I believe page one. Just
7 so that we're clear, in compiling ASCAP's chart
8 comparing public and commercial stations, the line
9 that you relied upon for the commercial stations was
10 this average line right here, this column under
11 reported total compensation.

12 A That's correct.

13 Q Would you walk down this chart with me and
14 identify how many of these individual people employed
15 by commercial radio stations earn more than \$50,243,
16 the amount that the senior executive at a public radio
17 station earns?

18 A Can you repeat that question again?

19 Q Let me do it differently. By my count,
20 there are 10 different positions in commercial radio
21 that earn on average more than the top executive or
22 what you assume is the top executive at a public radio

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1 station. Correct? Well, let's go down. General
2 sales manager, general manager, \$165,622. Correct?
3 That's higher than \$50,243, isn't it?

4 A Right. But as I was saying before, I
5 didn't -- this chart was not prepared to compare all
6 of the people who work for a commercial station to the
7 chief executive of a public station. The attempt was
8 to compare across similar job categories.

9 Q Okay. But if I wanted to though, for
10 instance, to compare how much a chief executive or
11 president of a public radio station made relative to
12 other lower ranking employees of commercial stations,
13 I could do that by looking at this average column
14 here. Correct?

15 A Sure you could.

16 Q Okay. And if I do that, I look at general
17 sales manager and I see that general sales manager
18 earns \$106,000 or more than on average the chief
19 executive at a public radio station earns. Correct?

20 A In total compensation yes.

21 Q In total compensation. And again, you are
22 not sure whether that total --

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1 A Remember, there is a distinction between
2 salary and total compensation.

3 Q But we're not sure exactly how much that
4 is because it's again all based on your assumptions as
5 to what those mean. Correct?

6 A And based on what the public stations
7 reported, yes.

8 Q Okay. There are a number of others as
9 well. I see local sales manager earns \$87,000 a year.
10 Correct?

11 A Total compensation.

12 Q Total compensation, right. And national
13 sales manager, \$89,000. That's higher than the chief
14 executive as well. Correct?

15 A Total compensation again.

16 Q Okay. New business development, \$62,000.
17 That's again higher than the chief executive at a
18 public station?

19 A Yes.

20 Q If I keep going down, I'll find the same
21 for account executive, second highest account
22 executive, program director, morning drive talent,

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1 afternoon drive talent. Correct?

2 A Yes.

3 Q So that all of those individual earn --

4 A (No response.)

5 MR. GULIN: Let him answer before going
6 onto the next question. I'm not hearing responses.

7 THE WITNESS: I was waiting for you to
8 finish.

9 BY MR. WEISS:

10 Q I'm sorry. Was that correct?

11 A That's correct for this particular, for
12 the all stations breakdown and for total compensation,
13 that's correct.

14 Q Let's stop there for a second because you
15 preferred in several of your charts not to look at the
16 all stations, but just to look at groupings of station
17 by on the one hand and public radio budget, and
18 commercial revenues. Correct?

19 A That's correct.

20 Q Now as I read the public licensee report,
21 the public salary report in the table of contents,
22 there appear to be six different categories of --

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1 A What exhibit are we looking at?

2 Q I'm looking, I'm sorry, again at Exhibit
3 310. The table of contents. There are a total of six
4 different ranges of budget listed for public radio
5 stations. Does that seem correct to you?

6 A Yes.

7 Q And if I were to compare that same page of
8 the commercial chart, Exhibit 701, I count 13 revenue
9 ranges.

10 A (No response.)

11 MR. DREYFUS: Counsel, you have to tell us
12 where you are.

13 MR. WEISS: I'm sorry. Again, the table
14 of contents, if you turn in page Roman I, Exhibit 701,
15 beginning at the item that says Table 8, revenues less
16 than \$500,000 through Table 20, revenues greater than
17 \$15 million.

18 BY MR. WEISS:

19 Q So again, there are six budget categories
20 for public radio, but 13 listed for commercial radio.
21 Is that correct?

22 A That is correct.

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1 Q The top budget category listed here in
2 Exhibit 310 in the table of contents is \$2 million and
3 over. Correct?

4 A That's correct.

5 Q And if you look at again, the table of
6 contents in Exhibit 701, there are ranges beginning at
7 Table 13, \$2 million to \$2.5 million, \$2.5 million to
8 \$3 million, going all the way up to \$15 million.
9 Correct?

10 A That's correct.

11 Q Did you attempt to figure out what
12 proportion of the public stations overall in the
13 United States are represented by the \$2 million or
14 more budget level?

15 A No.

16 Q Well if you turn to page 56 of Exhibit
17 310, it appears to me, and tell me if you agree, that
18 there are roughly 42 of the reporting stations earn \$2
19 million or more. Is that correct?

20 A On page 56? Yes.

21 Q Page 56. Forty two stations, public radio
22 stations at the highest level of \$2 million or more.

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1 Correct?

2 A Yes. That's correct.

3 Q By my count, again, if you'll just bear
4 with me with the map, I added up these individual
5 items and came up with a total of 340 stations that
6 were included within this report. I am happy to see
7 if we can get a calculator if you don't trust the
8 math. I assume you will agree with me that that is
9 roughly accurate.

10 A That's roughly accurate, yes. That's at
11 least roughly accurate, maybe 100 percent accurate.

12 Q By my calculations, that means that
13 roughly 12 percent of the public radio stations
14 responding or roughly 12 percent of the public radio
15 stations have revenues, excuse me, budget amounts of
16 \$2 million or more.

17 A Somewhere around 12, yes.

18 Q Now did you attempt to do a comparable
19 analysis or similar kind of analysis as to commercial
20 radio?

21 A No.

22 Q Would it surprise you to learn that almost

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1 three-quarters of the commercial radio stations listed
2 in the NAB report earn revenues of \$2 million or
3 greater?

4 A Would that surprise me? No.

5 Q Do you have any reason to believe that
6 that number is wrong?

7 A No.

8 Q So that in your view, a station that fell
9 within the highest range of budget in public radio, \$2
10 million or more was comparable to all other stations
11 in the commercial radio world that earn \$2 million or
12 more? Is that your view?

13 A What is your question?

14 Q Is there in your view, is a \$2 million or
15 more public radio station comparable to a \$2 million
16 or more commercial radio station?

17 A I think the stations that are more
18 comparable are the ones that fall into tighter revenue
19 or budget ranges.

20 Q So those are the approximately one-quarter
21 of stations in the commercial world as compared to the
22 rest of them? So that the smallest one-quarter you

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1 think is comparable to the public radio world? Is
2 that your testimony?

3 A Could you repeat that?

4 Q We said that roughly three-quarters of
5 commercial radio stations earn \$2 million or more.

6 A Yes.

7 Q So that means roughly a quarter earn less.

8 A Right.

9 Q So you are saying that the quarter that
10 earned the smallest amount of revenue in the
11 commercial radio industry are most equivalent to the
12 public radio stations. Is that your testimony?

13 A My testimony is that a public radio
14 station or group of stations whose budget is
15 somewhere, is in the neighborhood of \$2 million can be
16 compared to a commercial station whose revenues are in
17 the neighborhood of \$2 million in terms of what they
18 pay the people that work for them.

19 Q Did you do an analysis of where those
20 public radio stations earning \$2 million are located
21 geographically in the United States?

22 A I did not.

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1 Q Did you look at where the commercial radio
2 stations earning \$2 million are located in the United
3 States?

4 A I did not.

5 Q So it's very conceivable that a top public
6 radio station earning \$2 million or more is located in
7 the largest U.S. markets. Is that a fair assumption?

8 A It's possible.

9 Q And given the range of dollars that we're
10 talking about in the commercial world, isn't it
11 equally as likely that a commercial radio station
12 earning \$2 million is located in a much smaller
13 geographical region in the United States?

14 A Possible.

15 Q Certainly a reasonable assumption to make,
16 isn't it?

17 A Possible.

18 Q In any event, you didn't do that
19 calculation in preparing this chart. Did you?

20 A That is correct.

21 Q What I would like to do is let's look at
22 a couple of the other comparisons that you make here.

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1 Let's focus on the line announcer on-air talent.
2 That's the category that you took from the public
3 radio chart.

4 A Right.

5 Q And traffic director, which is -- excuse
6 me, news announcer. I apologize. News announcer,
7 which you took from the commercial chart.

8 A Yes.

9 Q Let's, if we may, this is a blowup of page
10 six of Exhibit 310. As I see it, the only announcer
11 on-air talents that appear in the radio charts are
12 literally that line, announcer on-air talent. Would
13 you agree?

14 A That's correct.

15 Q There are no other talents, there are no
16 other people you call announcers or talents.

17 A That's correct.

18 Q Let's look at the commercial charts. News
19 announcer is not the only talent listed in the
20 commercial charts. Is it?

21 A That's correct.

22 Q In fact, if you look down the list for

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1 commercial radio, there are several other on-air
2 talents listed. Right?

3 A Correct.

4 Q Morning drive talent. Mid-day talent.
5 Correct?

6 A Yes.

7 Q You agree these are all talents, I assume?

8 A That is what they are called.

9 Q Afternoon drive talent?

10 A Yes.

11 Q Evening and late night talent?

12 A Correct.

13 Q I would lump sports director announcer
14 into the same category since on-air talent and
15 announcers are lumped together here as well. Correct?

16 A You could do that.

17 Q So your comparison here, the one that you
18 thought was relevant to show the similarities between
19 public and commercial radio, is to compare this one
20 line item, \$28,639 for the on-air talent announcer to
21 the one news announcer line that appears in the
22 commercial chart. Correct?

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1 A That is correct.

2 Q That was a random decision to take the
3 news announcer out of all the various talents, wasn't
4 it?

5 A A random decision?

6 Q There was no reason to take news announcer
7 and distinguish news announcer from the various other
8 talents that are listed in this chart, were there? If
9 you wanted to make a relative comparison.

10 A (No response.)

11 MR. GULIN: Why don't you ask the question
12 why that selection was made?

13 BY MR. WEISS:

14 Q Why did you select that?

15 A Why did I select that? It seemed to me
16 that -- actually, let me look at the line again. I
17 don't recall why exactly I chose news announcer off
18 that list.

19 Q In any event, there is nothing in the
20 public radio chart, is there, that suggests that on-
21 air talent announcer refers only to news announcers,
22 does it?

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1 A Is there anything? No.

2 Q There is nothing. So it was simply your
3 assumption that that was the appropriate category to
4 compare to news announcer.

5 A Right.

6 Q Correct? So you compared the \$28,000
7 salary line to a \$31,000 salary line in the commercial
8 realm. Correct?

9 A Yes.

10 Q And if you were to add up the salaries for
11 morning drive talent, roughly \$93,000, mid-day talent,
12 \$39,000, afternoon drive talent \$50,000, evening
13 talent, \$29,000, late night talent, \$22,000, sports
14 director and announcer \$43,000. You would have
15 roughly ten times the amount spent on on-air talents
16 and announcers in the commercial, average commercial
17 station than you do in the average public station. Is
18 that right?

19 A But why would you add those up?

20 Q Well you are comparing how much was spent
21 on talent and announcers in one to talents and
22 announcers in the other industry. Isn't that right?

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1 A I am not comparing some aggregate figure.
2 So I don't see why you would add.

3 MR. SCHAEFFER: You mean average.

4 MR. WEISS: If you add the numbers, yes,
5 the amount that's spent by the typical commercial
6 station is roughly 10 times in the talent announcer
7 area as it is --

8 MR. GULIN: If you have one person perform
9 the task at one station, and you have 10 people
10 performing that same task, I understand. That's the
11 nature of the question. If that's the question that's
12 being asked, then it would be fair to aggregate.

13 MR. WEISS: These are all average, yes.

14 MR. DREYFUS: On the left. It says
15 average right there on the top of the column.

16 MR. WEISS: Correct. These are average.
17 This is the amount spent for the average on-air talent
18 to one, and these are the averages --

19 MR. DREYFUS: You added them all up and
20 you forgot to divide to get an average.

21 BY MR. WEISS:

22 Q My question is slightly different. Which

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1 is, isn't it true that the average commercial station
2 spends roughly 10 times in talents and announcers as
3 does the public station?

4 A I can't answer that question.

5 MR. SCHAEFFER: If you read the thing, it
6 doesn't say that this is when you got that job, that's
7 what you get paid. It's taking people from a
8 particular station.

9 CHAIRPERSON GRIFFITH: Mr. Weiss, you want
10 to respond to the objection?

11 MR. WEISS: I'm not sure. Was there an
12 objection?

13 CHAIRPERSON GRIFFITH: Yes.

14 MR. SCHAEFFER: One is an objection to
15 form. I said you are just -- if you read the report
16 it's perfectly clear. These weren't aggregated. If
17 you have a particular job, that's what the salary is.

18 MR. WEISS: Why don't we move on.

19 CHAIRPERSON GRIFFITH: He can answer the
20 question. If he can answer the question, he can do
21 it.

22 BY MR. WEISS:

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1 Q What I suggest we do is why don't we turn
2 our attention to the television charts for a moment
3 now. We are going through the same kind of analysis
4 in Exhibit 721, comparing public television and
5 commercial television, correct?

6 A That's correct.

7 Q Again, I've blown up the chart reflecting
8 the all station analysis in public and commercial
9 television. It on page 24 of Exhibit 721. Am I
10 correct that the average salary for public stations
11 listed in the middle column here was based upon a 1996
12 Corporation for Public Broadcasting salary report?

13 A That is correct.

14 Q The line item for commercials was based
15 upon a 1995 commercial broadcasting report. Correct?

16 A That is correct.

17 Q If you would turn to page two of Exhibit
18 311, you will see that the date as of which these
19 figures were prepared was January 1996. Is that
20 correct?

21 A What page are you looking at, of what
22 exhibit?

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1 Q Page two of Exhibit 311, 02.

2 A That's correct.

3 Q And page one of Exhibit 700 indicates that
4 this was prepared as of April 1, 1994, through March
5 31, 1995. Correct?

6 A That is correct.

7 Q So that we're beginning at the outset
8 we're comparing salary ranges at different time
9 periods. Is that right? This is 1996 and this is
10 1995. Correct?

11 A That's correct.

12 Q And the 1996 report, the Corporation for
13 Public Broadcasting report had numbers reflecting the
14 salaries and head counts for 1995, but you chose to
15 rely on the 1996 numbers instead in making the
16 comparison. Is that right?

17 A You are in?

18 Q Again, if you would look at, just so there
19 will be no confusion, if you look at page five as an
20 example of Exhibit 311, there's a line item in the
21 first numbers column indicates head count and average
22 salary for 1995. Correct?

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1 A Yes.

2 Q The second says head count, average salary
3 for 1996. Correct?

4 A That's correct.

5 Q But the numbers you chose to rely on were
6 not 1995, which would have made them more comparable
7 to commercial stations, but 1996. Correct?

8 We could test the proposition. Look at
9 the number in the all stations chart for chief
10 executive/president. If you look in the middle column
11 for 1996, I see \$105,042.

12 A Right.

13 Q Which is the number that you have relied
14 on.

15 A Yes.

16 Q Okay. Now the commercial television chart
17 provides a lot of information on fringe benefits.
18 Correct?

19 A Are you talking about the chart or the
20 report?

21 Q The report. Excuse me.

22 A It does provide information on the

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1 placement of this.

2 Q I've blown up a copy of page three of that
3 report. You see there are large numbers of fringe
4 benefits listed for employees of commercial television
5 stations. Correct?

6 A Correct.

7 Q Were there any comparable numbers
8 appearing in the public radio reports?

9 A As I said before, those reports were
10 salary reports.

11 Q Salaries only. Didn't include fringe
12 benefits?

13 A Yes.

14 Q When you were looking at the amounts,
15 comparable amounts earned by commercial and public
16 television employees, was it relevant to you to
17 consider how much these employees earned in fringe
18 benefits?

19 A Was it relevant how much they --

20 Q Well, when you are thinking about what
21 their compensation is, is fringe benefits something
22 that you think would be relevant in determining how

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1 much they earn?

2 A For the purposes of this chart, no. Not
3 at the time.

4 Q I would again ask, in the public radio and
5 commercial radio charts, we saw a difference in the
6 number of reported salary positions. Correct?

7 A Right.

8 Q Am I correct that there's also a
9 difference in the number reported in the public and
10 commercial television charts?

11 A From my recollection, yes.

12 Q Indeed, at page one of Exhibit 311, it
13 indicates that 81 positions were analyzed for the
14 public television realm. Is that right?

15 A Yes.

16 Q And I counted 36 different positions at
17 pages two, three, and four of the commercial chart.
18 Does that sound about right to you?

19 A I'll accept your count.

20 Q So there are more than double the number
21 of public television employees reported on than there
22 are commercial television employees. Correct?

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1 A Employees or positions?

2 Q Excuse me, positions. I apologize.

3 A Correct.

4 Q Do you have any understanding as to the
5 basis for those differences?

6 A I don't.

7 Q Let's look at some of the individual
8 items, individual employees that you looked at for
9 purposes of creating this chart. I would like to
10 focus on the item for reporter, second from the bottom
11 here. The average salary for public stations for a
12 reporter/news reporter is \$35,696, compared to \$31,239
13 for commercial stations. Correct?

14 A That is correct.

15 Q If you would indulge me for a moment. If
16 I read the public station chart accurately, again this
17 is the all public station chart.

18 A Right.

19 Q Under reporter, I see that there is a
20 total head count of 43 reporters. Is that right?

21 A That is correct.

22 Q And there are 197 public television

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1 stations responding to this particular report.

2 Correct?

3 A That number is from?

4 Q That number is from page 45 of Exhibit
5 311, if you would like to check and concur. I got
6 that by adding up the terms at the bottom, the numbers
7 at the bottom.

8 A Okay.

9 Q So that of the 197 public television
10 stations, 43 of them had reporters. Is that the way
11 you read it, or at most 43?

12 A At most 43 reported reporters.

13 Q Do you have any reason to suspect that if
14 somebody had a reporter, they wouldn't have identified
15 that person?

16 A I have no reason.

17 Q So that by my count, even assuming that
18 each station that had a reporter had only one, 21
19 percent of the stations in the public broadcasting
20 world had television reporters. Do you accept my math
21 for these sake here?

22 A Yes.

1 Q Let's look at the commercial television
2 chart. Let's look under news reporter. Full time
3 employees, average number, it says seven. So is that
4 your understanding that the average commercial
5 television station has seven news reporters?

6 A Yes.

7 Q So whereas roughly a fifth of the public
8 stations have news reporters, a typical station has
9 seven, the average station in the commercial realm has
10 seven.

11 A Yes.

12 Q And those are not the only reporters or
13 individuals who report the news or who act as on-air
14 talents. Are they?

15 A No.

16 Q Indeed, if we wanted, by the way, to
17 figure out how much the average TV station, commercial
18 TV station in the country paid to its reporters, I
19 assume that the proper way to do that would be to
20 multiply this average number of employees, seven,
21 times the salary listing, \$31,239. That would tell
22 you how much they are paying for reporters on average.

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1 Correct?

2 A Say that again, please?

3 Q If the average number of employees is
4 seven and the average salary is \$31,000, and you want
5 to find out how much they are paying in total to
6 reporters, you would multiply the seven by the
7 \$31,000. That would tell you the number.

8 A I don't understand what use that number --
9 I don't understand what you would use that number to
10 tell you.

11 Q If you wanted to know, for instance,
12 whether -- you wanted to know how much a television
13 station or commercial television station is paying for
14 reporters, that is something -- that is the way you
15 would have to calculate it, correct?

16 A That is not the way I would calculate it.

17 Q How would you calculate it?

18 A Well, if you are talking about -- I just
19 wouldn't calculate it the way you did it. You are
20 taking the average number of reporters that stations
21 all over the country have.

22 Q Right.

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1 A And then you are taking --

2 Q The average salary that those reporters
3 earn.

4 A The average salary that reporters earn at
5 all stations, and you wanted to multiply those to get
6 the amount that the average station pays all of its
7 reporters?

8 Q Average amount that stations pay for
9 reporters.

10 A I would not do it that way.

11 Q How would you do it?

12 A I would have to sit and think about it.
13 I definitely wouldn't do it that way.

14 Q Okay.

15 A I get in trouble for doing it that way at
16 my current job.

17 Q In any event, if I wanted to find out --
18 let's take the reverse. If I wanted to find out on
19 average how much is spent at an individual public
20 radio station for reporters, the way I would assume
21 you would do it is multiply the average salary,
22 \$35,000 times the total number of reporters, 43, which

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1 by my count comes to \$1,534,920. Then divide that by
2 the total number of stations in the country. Correct?
3 One hundred and ninety seven. That will give you the
4 average amount spent by stations on reporters. Does
5 that sound right?

6 A Say that again? So you take the average -
7 -

8 Q Take the total head count.

9 A Total head count.

10 Q That's an absolute number there, 43
11 reporters overall.

12 A Right. And multiply it by the average
13 salary.

14 Q Multiply that by the average salary.

15 A Right.

16 Q That will give you the total salaries paid
17 for news reporters by public television stations.

18 A Right.

19 Q So if you wanted to know on average how
20 much it spent per station, you divide by the total
21 number of stations. Correct? That's 197 we talked
22 about.

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1 A But of course a minute ago -- well, that
2 would be a rough way to do it, but that would not take
3 into account stations that don't have reporters.

4 Q Right. It wouldn't take into account the
5 stations that don't have reporters, because most
6 stations as we recalled, don't have any reporters.

7 A Right. So would you be dividing by the
8 number of total stations or the number of stations
9 with reporters.

10 Q If I wanted to find out how much it spent
11 on average per station, I think I would divide by the
12 total number of stations.

13 A Even though a good number of them don't
14 have? Okay. You can do that.

15 Q When I do the math, it comes out to on
16 average \$7,791 being spent for reporters by the
17 typical --

18 A But of course you included a bunch of
19 stations that have no reporters. So you took this big
20 number of total stations to use to divide this number
21 by. Of course you end up with a number that's only
22 seven grand. But there is no station out there that

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1 is paying seven grand, because you included a bunch of
2 stations that were paying zero.

3 Q Because most typical public television
4 stations are different than most commercial television
5 stations and don't have any reporters. Correct?

6 A I can't answer that question.

7 MR. SCHAEFFER: Object to the form of the
8 question. None of this has anything to do with the --

9 CHAIRPERSON GRIFFITH: All right. The
10 objection is sustained. Let's take our afternoon
11 recess.

12 (Whereupon, the foregoing matter went off
13 the record at 3:33 p.m. and went back on
14 the record at 3:43 p.m.)

15 CHAIRPERSON GRIFFITH: All right.

16 MR. WEISS: Your Honors, I have no further
17 questions.

18 MR. SCHAEFFER: I just have two. One in
19 fairness to Mr. Anderson.

20 REDIRECT

21 BY MR. SCHAEFFER:

22 Q Mr. Anderson, Exhibit 701, which is the

1 1996 NAB radio salaries, I am going to show you page
2 Roman number two of it. Where I redlined it, does
3 that refresh your recollection as to why you put the
4 legend to 1995 salaries comparing it to 1995 salaries?
5 This is from the 1996 report.

6 A Yes. It does.

7 Q What does it say?

8 A It says total compensation including bonus
9 and incentive earnings was requested for all positions
10 for the calendar year 1995.

11 Q We'll worry about -- what I am really
12 afraid, I'm going to get killed.

13 We'll deal with this later on. You
14 mentioned a news article or news articles that you
15 read which indicated that there was some controversy
16 about bonuses and additional payments being made to
17 chief executive officers at the public broadcasting
18 stations?

19 A That is correct.

20 Q I am going to show you an article for
21 Current which we have marked as ASCAP 5, 111.6789,
22 entitled, "Uproars over executive salaries blow up,

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1 then blow over." Is this the article you were talking
2 about?

3 A Yes. This is it.

4 MR. SCHAEFFER: Thank you. I offer that
5 article.

6 MR. WEISS: I would like to see it.

7 MR. SCHAEFFER: Sure.

8 MR. GULIN: Which exhibit is this?

9 MR. SCHAEFFER: 511.678. It was a Grajeda
10 exhibit.

11 MR. WEISS: I don't believe this witness
12 has any particular knowledge or experience that would
13 enable him to know anything as to the facts or
14 veracity of any of the items reported in here. So I
15 certainly object to their coming in for any of the
16 substantive purposes other than the fact that he
17 looked at it in connection with preparing his chart.

18 CHAIRPERSON GRIFFITH: And that's where he
19 got his information.

20 MR. SCHAEFFER: That is correct, Your
21 Honor.

22 CHAIRPERSON GRIFFITH: Any objection?

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1 MR. WEISS: One other issue, Your Honor,
2 is he looked at this after the chart was prepared. So
3 I don't know how this is at all relevant really to his
4 testimony in connection with the preparation of this
5 chart.

6 MR. SCHAEFFER: I don't know what he said
7 he looked at it. It was raised by Mr. Weiss on cross
8 examination. He asked him if he had found any
9 material which reflected additional compensation
10 besides salaries. That article indicates that there
11 is a substantial fight going on in Minnesota Public
12 Television and elsewhere about excess payments being
13 made to the chief executive officers of public
14 stations, which was just what Mr. Weiss asked. He
15 then said there was such an article. Now you get it
16 and you don't want it.

17 MR. WEISS: He clearly indicated this was
18 after he prepared the report, and had nothing to do
19 with his preparation of the report.

20 MR. SCHAEFFER: Well, I'll --

21 CHAIRPERSON GRIFFITH: Wait a minute. One
22 at a time, please.

1 MR. WEISS: Again, the subject of the
2 objections that I've raised, I have made the
3 objections as I indicated.

4 CHAIRPERSON GRIFFITH: All right.

5 MR. GULIN: Which one is this? This is
6 511?

7 MR. SCHAEFFER: 6, 7, 8 and 9.

8 MR. GULIN: So that these are -- this is
9 an exhibit portion of some parts that are in
10 controversy?

11 MR. SCHAEFFER: Yes.

12 MR. WEISS: Your Honors, am I to
13 understand that this article is being offered for its
14 truth?

15 MR. SCHAEFFER: It is offered to show what
16 it is that he relied on to make the statement that he
17 did in his --

18 MR. WEISS: I'll offer it for the truth
19 later on, when your witness is on the stand.

20 MR. GULIN: I think it could be admitted
21 for that purpose.

22 CHAIRPERSON GRIFFITH: It's admitted for

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1 that purpose.

2 MR. GULIN: Just wait then and have it
3 admitted --

4 MR. SCHAEFFER: Well why don't we admit it
5 for that purpose. I'm sure we're going to get into
6 this subject with their witness.

7 CHAIRPERSON GRIFFITH: It is admitted for
8 that limited purpose only.

9 (Whereupon, the document which
10 was previously marked for
11 identification as Exhibit No.
12 511-6,7,8,9 was admitted into
13 evidence.)

14 MR. WEISS: Thank you.

15 MR. GULIN: So the motion to strike is
16 withdrawn.

17 CHAIRPERSON GRIFFITH: You are withdrawing
18 it?

19 MR. WEISS: There is no motion to strike,
20 given the limited purpose for which it's being
21 entered.

22 MR. GULIN: Well there is an outstanding

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1 motion to strike these documents. Correct?

2 MR. WEISS: The Grajeda motion, I
3 apologize, Your Honors. Yes, in so far as it's been
4 offered and entered into evidence for that limited
5 purpose --

6 CHAIRPERSON GRIFFITH: Thank you.

7 Any other questions?

8 MR. SCHAEFFER: None from me, Your Honor.

9 CHAIRPERSON GRIFFITH: Mr. Anderson, you
10 are free to go, sir. Thank you very much.

11 THE WITNESS: Thank you.

12 MR. SCHAEFFER: Ms. Willett is going to
13 take the next and last witness today, Your Honor.
14 Whereupon,

15 LAURENT IOSSA
16 was called as a witness, and after having first been
17 duly sworn, was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MS. WILLETT:

20 Q Ms. Iossa, please state your full name for
21 the record, please.

22 A Lauren Iossa.

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1 Q And you are employed by ASCAP?

2 A Yes.

3 Q And what is your position with ASCAP?

4 A Assistant Vice President of Marketing.

5 Q And before that?

6 A I was Assistant Vice President of
7 Membership Marketing and Promotions.

8 Q And could you just briefly describe your
9 job responsibilities at ASCAP in your current
10 position?

11 A Yes. Well, as assistant vice president of
12 marketing, our department is responsible for
13 communications to members, publications, event
14 management, and compiling research and data about the
15 activities of our members, their accomplishments, the
16 ASCAP repertory and the ASCAP membership.

17 Q And how long have you been with ASCAP?

18 A Thirteen years.

19 Q For your testimony today, you have
20 compiled some materials concerning ASCAP. Is that
21 correct?

22 A Yes.

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1 Q And could you just describe briefly the
2 purpose for which these exhibits are being offered to
3 the panel?

4 A Yes. To help the panel understand the
5 breadth and scope of the ASCAP repertory, who our
6 members are, what they do, the public recognition they
7 receive, to explain information about some of the ways
8 that ASCAP supports our musical culture and the
9 activities that ASCAP as an organization is involved
10 in.

11 Q And you have compiled these exhibits and
12 we're going to go through them. They fall loosely into
13 certain categories?

14 A Right. Into three categories. The first
15 is with respect to the ASCAP membership, who they are,
16 and recognition ASCAP members have received, their
17 prominence.

18 The second category is information about
19 the ASCAP repertory itself. In the third category, is
20 a category, I guess I'll say of musical citizenry.
21 Our former president Morton Gould used to talk about
22 the need for organizations to be involved in helping

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1 to improve and enhance the musical culture in a
2 variety of ways. The third group response to that.

3 Q If you would like to follow along, these
4 are ASCAP Exhibits 35 through 61. I apologize we're
5 not going to go through them in exactly that order,
6 but we'll tell you before which ones we are going to
7 focus on as we go along.

8 We are going to look first at ASCAP
9 Exhibits 35 through 39, and I believe 60 and 61.

10 A Okay. The first, Exhibit 35, is simply a
11 printed list of the ASCAP membership, which was
12 created in 1997. It was all the writer and publisher
13 members of ASCAP by name. I should say that the ASCAP
14 membership grows by about 250 writers and publishers
15 on a weekly basis. So this represents those that were
16 members at the date of printing in 1997.

17 The second exhibit, Exhibit 35, are --

18 Q Exhibit 36.

19 A Thirty six, I'm sorry. Highlights of
20 recent awards, honors, and achievements with respect
21 to the ASCAP membership. These are just those that
22 have been given in the last couple of years. We start

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1 with major award winners by member name. The first
2 one on the list is Wynton Marsalis for his Pulitzer
3 Prize "Blood on the Fields." I won't go into every
4 member obviously, but we list a variety of types of
5 awards, the Pulitzer, Grammy awards, to Gordon Kennedy
6 and Tommy Simms for their song of the year, "Change
7 the World." The Chieftans, an Irish group, many Latin
8 groups.

9 It really is there to show the breadth of
10 the ASCAP repertory. The academy award for Steven
11 Schwartz for Pocahantas. Those of us with children
12 all know that. MTV award winners, country award
13 winners, major film and television award winners in
14 the last couple of years alone.

15 Q The next exhibit is ASCAP Exhibit 37.
16 What is that exhibit?

17 A That is awards, honors, and achievements
18 to members. These are more comprehensive lists.

19 CHAIRPERSON GRIFFITH: Excuse me. Are you
20 going to object to any of these?

21 MR. STEIN: We don't intend to object.
22 The documents speak for themselves. We would be

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1 willing to allow them in.

2 CHAIRPERSON GRIFFITH: All of them?

3 MR. STEIN: Yes.

4 CHAIRPERSON GRIFFITH: Because I think
5 that you could shorten it quite a bit if they are not
6 going to object to them. I mean we're perfectly
7 willing to sit here and listen to you describe them
8 and so forth, but if they are going to be into
9 evidence, we have got to read them and look at them.

10 So whichever you want to do. We're just
11 trying to help you out.

12 MS. WILLETT: Okay. I think briefly we
13 could just highlight maybe just a few things. I think
14 that the witness wanted to just point out a few things
15 about our membership so that you get a better
16 understanding of the ASCAP membership and the depth of
17 the repertory. So we will endeavor to make it as
18 brief as possible.

19 CHAIRPERSON GRIFFITH: In view of the fact
20 that they are not going to object to them coming into
21 evidence.

22 MS. WILLETT: Yes. Would the panel like

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1 for her to go through them?

2 CHAIRPERSON GRIFFITH: You are certainly
3 entitled.

4 MS. WILLETT: Would you like to hear some
5 highlights?

6 CHAIRPERSON GRIFFITH: Yes, sure.

7 THE WITNESS: Well, for example, if we
8 look at the list of ASCAP Pulitzer award recipients,
9 they range from Ira Gerschwin and Aaron Copeland
10 through contemporary writers like Wynton Marsalis,
11 Marvin Hamlisch. Again, to give you a sense of the
12 scope of the repertory and the diversity of our
13 members.

14 We have a list of our Grammy nominees. As
15 you can see, there are hundreds of them for 1997.
16 Exhibit No. 39, prominent ASCAP members is a list of
17 members recognized by outside organizations, members
18 inducted into the Songwriters Hall of Fame, the Rock
19 and Roll Hall of Fame, great ASCAP symphonic
20 composers, great ASCAP jazz composers.

21 On the symphonic side, we have names, such
22 venerable names as Bartok, Leonard Bernstein, Aaron

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1 Copeland, Gustaf Mueller, Morton Gould, Elgar,
2 Kachechurian, Shostakovich, Rachmoninov, Ravel,
3 Stravinsky, who are all composers whose works are
4 licensed by ASCAP.

5 On the jazz side, I don't even have to
6 refer on that one since it's my love. We have people
7 like Duke Ellington, Count Basie, Fats Waller, UB
8 Blake, Louie Armstrong, Wynton Marsalis, Dizzie
9 Gillespie.

10 Q And just ASCAP exhibit 60 and 61, just
11 tell the panel what those exhibits are?

12 A Briefly these are the application kits
13 that are sent to writers and publishers interested in
14 joining ASCAP. They contain basic information about
15 ASCAP and the membership application.

16 Q We're just going to go through the next
17 category quickly. The second category that you told
18 the panel about, just to describe sort of the breadth
19 of the ASCAP repertory. These exhibits were prepared
20 for that purpose. Is that correct?

21 A Right. Exhibit 40 is actually a printer's
22 draft of something we are in the process of

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1 completing, which is a list of hit songs that ASCAP
2 has licensed through the years. It is by year and it
3 just gives you a wonderful look or snapshot of songs
4 that were popular at any given time. We have Mr.
5 Sandman here in 1954. It goes on and on. Again, this
6 is something our licensees have often requested. That
7 is the purpose of this. It's not complete yet.

8 The next exhibit, Exhibit 41, is a listing
9 of foreign societies that are affiliated with ASCAP.
10 We license the works of their members within the
11 United States. I would say virtually every country
12 that recognizes copyright is affiliated with ASCAP and
13 we license their works. Some of the very major
14 foreign writers who do license through ASCAP range
15 from Pierre Bulez and Albonbere to Carl Orff, Inia
16 Moraconi, the film composer. The list goes on and on.
17 The Rolling Stones, U2, Sibelius. It's comprehensive.

18 The next document, Exhibit 42, has to do
19 with works that were in the public domain, and as a
20 result of the GATT treaty, have come back into
21 copyright and are licensed by ASCAP. This is a list
22 of compositions, a select list, not a complete list of

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1 compositions that are licensed by ASCAP. As a result
2 of that, some of the composers, Prokofiev,
3 Kachechurian, Shostakovich, all of them have works
4 that did fall into the public domain and are now
5 licensed, again Stravinsky, with ASCAP licenses.

6 Q Do a lot of these works fall into a
7 general category that you might describe as symphonic
8 and concert classical music?

9 A Yes. Yes. I'll take the next exhibits as
10 a group. Exhibits 55, 56, 57, 58, and 59. Each year,
11 ASCAP honors the writers and publishers of the most
12 performed works in our repertory in a variety of
13 musical categories. We have rhythm and blues, popular
14 music in general, film and television music, Latin
15 music, and country music awards ceremonies, where we
16 honor the writers and publishers of the most popular
17 works in our repertory for the prior year.

18 These programs list all of those
19 compositions, to give you a sense again, of the
20 diversity in terms of musical genre of our repertory.

21 Q And then just the last category that we're
22 going to look at that I believe you stated describes

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1 ASCAP activities and the sort of citizenship.

2 A Right.

3 Q Activities.

4 A Right. The first exhibit in that
5 category, I guess it's out of order in your books, is
6 Exhibit 43, ASCAP issued awards. ASCAP on an annual
7 or periodic basis issues awards, not only to our own
8 members, but to others who help to spread the word
9 about ASCAP music and music in general. The first
10 thing we note here, I'll make particular mention of
11 this, are the ASCAP Deems Taylor awards, which were
12 named in honor of the former president of ASCAP, and
13 lyricist, author member of ASCAP who also was a very
14 famous critic, music critic.

15 You may know him. He is the gentleman who
16 introduces Disney's Fantasia. That is his main claim
17 to fame it seems in the modern world. But each year,
18 ASCAP honors journalists and authors for outstanding
19 work in music.

20 In addition, several years ago, we
21 initiated awards within that category for broadcasters
22 for excellence in music programming. If you look at

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1 the list we have here, I would say there is a
2 preponderance in the broadcast category of public
3 television winners of Deems Taylor awards.

4 Some of the other awards are awards that
5 we honor for lifetime achievement and excellence in
6 music. For example, the Henry Mancini award in honor
7 of great film composers for their lifetime
8 achievement. The Harry Chapin award, which is in
9 honor of musical artists who have made tremendous
10 humanitarian efforts.

11 The next two, Exhibit 44 and 45, are
12 simply highlights of different programs that the ASCAP
13 membership department is involved with. In fact,
14 several of the next exhibits pertain to that. ASCAP
15 is very involved in programs that help to foster new
16 talent through grant programs, scholarship programs,
17 workshops. Many of our accomplished writers
18 participate in those programs and run those programs
19 for developing writers.

20 We go to Exhibit 47, ASCAP last year
21 inaugurated a jazz Wall of Fame. Our office is in New
22 York. Bennie Carter was the premier inductee on the

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1 jazz Wall of Fame. Each year we'll honor new writers
2 and induct them into that Wall of Fame.

3 Exhibits 48, 49, again have to do with the
4 various showcases, workshops, grant programs,
5 scholarships, commission programs and things like that
6 that ASCAP is involved with. I won't go through all
7 of them, but you can see them here, through both ASCAP
8 and our foundation.

9 This is Exhibit 50, is an example of the
10 kind of informational document we produce to help
11 people understand their rights in the music industry.

12 Exhibits 51, 52, 53, and 54 primarily have
13 to do with symphonic music. We have a symphonic and
14 concert music department that's involved with not only
15 helping the writer members of ASCAP in that
16 department, but also they honor the chamber music
17 groups, choral music groups, and symphony orchestras,
18 who exhibit excellence in programming and use of
19 American music repertory. This just explains some of
20 those programs.

21 MS. WILLETT: That's all I have for direct
22 examination.

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1 CHAIRPERSON GRIFFITH: All right. Mr.
2 Kleinberg, do you have any questions, sir?

3 MR. KLEINBERG: No questions. Thank you.

4 CHAIRPERSON GRIFFITH: All right.

5 MR. STEIN: My best imitation of Mr.
6 Kleinberg, we have no questions.

7 THE WITNESS: That was easy. I guess it
8 pays to be the last witness on a Friday afternoon.

9 CHAIRPERSON GRIFFITH: It helps, believe
10 me. Thank you very much.

11 Now those exhibits are admitted, or have
12 been already filed and already in at this point.

13 (Whereupon, the document marked
14 for identification as ASCAP
15 Exhibit Nos. 35-61)

16 Now that concludes the witnesses for
17 today. Is that correct?

18 You may step down, ma'am. You don't have
19 to sit here. Who do you have left?

20 MR. SCHAEFFER: Peter Boyle. That will be
21 on Thursday.

22 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

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1 MR. KLEINBERG: Yes. I thought I would
2 enlighten everyone, being on the schedule as we see it
3 starting Monday. We meant the BMI case. Our first
4 witness we anticipate is Alison Smith, followed by
5 Fred Willms. That I think will be Monday. Tuesday,
6 Dr. Bruce Owen and Janet McFadden. Then Wednesday,
7 Roy Epstein, whom I think will be a relatively short
8 witness.

9 Unfortunately, our last witness the
10 composer Mr. Bacon can't be here except on Thursday
11 because he is in fact composing and taping. So he
12 will not I believe be a very long witness. So he will
13 be here though on Thursday. I leave it to others to
14 decide what we do with the balance of Wednesday, but
15 I am pretty confident I think in talking with counsel
16 that we don't think that we are going to be taking up
17 with our prior witnesses through much of Wednesday.

18 MR. SCHAEFFER: I haven't been able to
19 reach Dr. Boyle. If he can appear on Wednesday, I'll
20 try and get him for Wednesday, but I can't assure you
21 because I already -- I think he has a board meeting
22 and is already released for it. So it's hard to get

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1 him off that -- if I can, I certainly will advise you
2 on Monday.

3 CHAIRPERSON GRIFFITH: I think Mr. Rich
4 indicated he wanted to start your case the week of the
5 30th.

6 MR. WEISS: The week of the 30th. Yes,
7 Your Honor.

8 CHAIRPERSON GRIFFITH: Okay. Fine.

9 We'll know something definite Monday. We
10 can work on what to do about Wednesday on Monday.

11 MR. SCHAEFFER: I spoke to Mr. Rich, and
12 we are going to try and talk on Monday morning. The
13 office, is this open at 9:00, because then we can come
14 here.

15 CHAIRPERSON GRIFFITH: This office?

16 MR. SCHAEFFER: Maybe we can come at 8:30.

17 MR. DREYFUS: I was here at 8:15 this
18 morning. Everything was open.

19 MR. SCHAEFFER: That would be great. Then
20 we can get some resolution on the documents because
21 that will affect the length of the -- otherwise, that
22 would affect the length of our cross examination.

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1 CHAIRPERSON GRIFFITH: Well, we can not
2 begin the arbitration panel proceedings on Monday,
3 however, until 10:00.

4 MR. SCHAEFFER: That's great.

5 CHAIRPERSON GRIFFITH: Monday morning.
6 After that, next week we can start at 9:30 if that's
7 your pleasure.

8 MR. SCHAEFFER: The time is excellent on
9 Monday because that will give us a chance to fight
10 with each other.

11 CHAIRPERSON GRIFFITH: Out of deference to
12 the subject matter of this panel arbitration, I want
13 you all to know that I have worn my Jerry Garcia tie
14 today. I presume that he's a member of one of these
15 two organizations.

16 MR. SCHAEFFER: I am going to wear my PBS
17 tie next week.

18 MS. WILLETT: ASCAP.

19 CHAIRPERSON GRIFFITH: We are adjourned
20 until 10:00 Monday morning.

21 (Whereupon, at 4:08 p.m. the proceedings
22 were adjourned, to continue on Monday.)

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the matter of: Hearing: Adjustment of the Rates for
 Noncommercial Educational
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 Docket No. 96-6 CARP NCBRA

Before: Library of Congress
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Date: March 13, 1998

Place: Washington, DC

represents the full and complete proceedings of the
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